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Relative International Legal Personality of Non-State Actors

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RELATIVE INTERNATIONAL LEGAL PERSONALITY OF NON-STATE ACTORS

*William Thomas Worster**

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INTRODUCTION

Functionalism analysis is now the controlling approach for assessing which non-state actors enjoy limited international legal personality, and thus whether they have the capacity for international rights and obligations. While on the one hand, conservative authorities might insist that the only true subjects of international law are states,¹ on the other hand, there is considerable authority supporting the notion that non-state

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1. See JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 10 (2005); ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 42–79 (2010).

actors are international legal persons. For legal clarity and certainty, international law needs to distinguish those entities that are legal persons from those that are not (a binary approach) and identify which entities are objective persons *erga omnes*. It also needs to establish which rights, duties, and obligations those entities hold on the international plane. Although some schools of thought suggest that once an entity is identified as a legal person, it enjoys that personality in an objective, *erga omnes* manner, actual practice is more equivocal, and many non-state actors exist as quasi-persons or hybrid entities that blur the distinctions. These entities are considered international legal persons for some purposes but not others, or only in relation to certain actors but not others. Thus, within the category of non-state actors, a challenge of personality fragmentation exists: identifying which actors are international legal persons vis-à-vis existing legal persons and for which purposes they can be treated as international legal persons. This article will examine the variable and disaggregated international legal personality of non-state actors with the goal of discovering how international legal personality is currently understood.

A survey of various entities and quasi-persons suggests that the overriding consideration in the international community and legal system is function. In the field of international organizations, the functional approach is already well-known for questions concerning the powers of organizations.² This article will identify the international practice of treating non-state actors as international legal persons and will argue that non-state entities have personality in the international legal system to the degree to which they function on the international legal plane. Notwithstanding Ian Brownlie's submissions on the matter,³ this consideration is not truly circular. The existing legal persons assess the actions (or proposed actions) of certain entities and consider the need or benefit of engaging with those entities as international legal persons rather than as domestic legal persons or unincorporated entities. From this assessment, international rights and duties are assigned. This process is reminiscent of the

2. See generally Jan Klabbbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 EUR. J. INT'L L. 645 (2015) (documenting the development of functionalism in the law of international organizations).

3. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57 (6th ed. 2003).

International Court of Justice's (ICJ) approach in the *Reparations* case, which assessed the needs of the international community and the nature of the entity's functions to determine whether the United Nations had international legal personality.⁴ For example, once the international community decided that it needed the United Nations to be an international legal person, the entity acquired personality for the designated functions in the Charter of the United Nations ("U.N. Charter") and in its designated relationships with its Member States. Because this assessment is necessarily dependent on the entities' functions and exists within a specified relationship, international legal personality for non-state actors is therefore relative and subjective.

This article will first discuss the nature of international legal personality in Part I before exploring the legal personality of various other non-state actors in the following sections. This article will consider international organizations, "peoples" (for purposes of self-determination), National Liberation Movements (NLMs), indigenous peoples, insurgents, belligerents, combatants, private corporations, non-governmental organizations (NGOs), religious organizations, and individuals. Throughout this survey, the article will assess each actor and conclude whether it is considered or treated as if it were an international legal person on a functional basis.

I. INTERNATIONAL LEGAL PERSONALITY

It is well accepted in legal doctrine that some non-state entities enjoy rights, duties, and international legal personality under international law.⁵ Certainly, these entities are different

4. See *Reparation for Injuries Suffered in Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 178–89, 182–84 (Apr. 11) ("requirements of international life"); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. Rep. 66, ¶ 25 (July 8); Josef Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308 (1952) (accepting the possibility that an entity with unusual purposes, not normal state purposes, could nonetheless qualify as a state).

5. See Jan Klabbers, (*I Can't Get No*) *Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, in *NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI* 369 (Jarna Petman & Jan Klabbers eds., 2003); G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 48 (1st ed. 1947). Hersch Lauterpacht notes:

from states,⁶ but it is important to assess the kind of personality they enjoy to understand their variable legal nature. The difficulty is that, aside from states, there is no clear law designating international legal personality.⁷ Most authorities agree that an international legal person is an entity with a certain capacity for international rights and obligations.⁸ Some authorities take a less demanding approach to defining capacity, looking merely for capacity to enjoy international rights and obligations,⁹ whereas

International practice shows that persons and bodies other than states are often made subjects of international rights and duties, that such developments are not inconsistent with the structure of international law and that in each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from the preconceived notion as to who can be the subjects of international law.

HERSCH LAUTERPACHT, *The Subjects of the Law of Nations*, in 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSC LAUTERPACHT 494 (1970); see also W. E. HALL, A TREATISE ON INTERNATIONAL LAW 17 (8th ed. 1924) ("[T]o a limited extent . . . it [international law] may also govern the relations of certain communities of analogous character."); T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 69 (7th ed. 1923) (stating that subjects of international law include "those other political bodies which, though lacking many of the attributes of sovereign states, possess some to such an extent as to make them real, but imperfect, international persons").

6. See *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 174, 180.

7. See PORTMANN, *supra* note 1, at 9.

8. See *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 179; Vincent Chetail, *The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward*, in *UNITY AND DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR PIERRE-MARIE DUPUY* 105, 108 (D. Alland, V. Chetail, O. de Frouville, & J. E. Vinuales eds., 2015); HERSC LAUTERPACHT, *General Rules of the Law of Peace*, in 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSC LAUTERPACHT 179, 193 (1970); Myres McDougal & Harold Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1960); see also *Case 22/70, Comm'n of the European Communities v. Council of the European Communities*, 1971 E.C.R. 263 (holding that, where an entity is granted personality, then it must have the normal powers of an international legal person, such as adopting treaties).

9. See LAUTERPACHT, *supra* note 5; see also *Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic*, 17 I.L.M. 1, ¶ 66 (1978)

others are more demanding, requiring specific capacities, such as the capacity to conclude international agreements, conduct diplomatic relations (active and passive legation), and bring international claims.¹⁰ To some degree, this debate hinges on the form of participation of the actor on the international plane, both in creating and applying violations of the law and also in identifying violations of the law.¹¹ This approach also “functionalizes” personality, moving away from a status from which rights and duties flow and toward a status that is the result of actions. Yet, these distinctions between actors that fully participate and those that do not are increasingly less relevant as new actors participate in the law in partial ways.¹² Further, enforcement of the law is diffuse and often noncompulsory.¹³ International law

[hereinafter Award on the Merits in *Texaco Overseas Petroleum Company*]; *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 187.

10. See BROWNIE, *supra* note 3; NIGEL D. WHITE, *THE LAW OF INTERNATIONAL ORGANIZATIONS* 84 (2d ed. 2005); C. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW* 19 (1974); LAUTERPACHT, *supra* note 5, at 494–500; P. K. Menon, *The Subjects of Modern International Law*, 3 HAGUE Y.B. INT’L L. 3, 84 (1990); David Feldman, *International Personality*, in 191 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 345, 358–59 (1985).

11. See generally Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35 (2005) (discussing the distinction between subject and person).

12. See *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 178 (“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.”).

13. See LAUTERPACHT, *supra* note 5, at 286–87. Lauterpacht discusses the difficulty and lack of capacity to enforce international law, without that problem being necessarily fatal to the existence of a substantive obligation. He notes:

It is useful not to exaggerate the importance of what is, in the last resort, a procedural rule. The faculty to enforce rights is not identical with the quality of a subject of law or of a beneficiary of its provisions. A person may be in possession of a plenitude of rights without at the same time being able to enforce them in his own name. This is a matter of procedural capacity. Infants and lunatics have rights; they are subjects of law. This is so although their procedural capacity is reduced to a minimum.

Id.

has struggled to integrate these subjective and relative international actors into the international legal system,¹⁴ and, following these capacity considerations, the emerging practice is to view the entities functionally.

The debate over the law of recognition, while contentious in the case of states, is largely uncontroversial for non-state actors. States, as “original” (or perhaps “natural” in a sense) legal persons,¹⁵ retain significant discretion to recognize non-state actors and, more fundamentally, serve as gatekeepers to the international legal order. Emerging participants in international law do not participate by inherent right, as states do, but rather as a result of states admitting them. Thus, recognition theory for non-states is analogous to the constitutive theory of state recognition.¹⁶ For example, it is not entirely clear whether the limitations on nonrecognition for purported states, such as *jus cogens*

14. See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 213–15, 234, 247 (1964); HERSCH LAUTERPACHT, *State Sovereignty and Human Rights*, in 3 *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 416, 430 (1977); Hersch Lauterpacht, *The Subjects of the Law of Nations*, 64 L. Q. REV. 97, 110 (1948).

15. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. ¶ 25. In its advisory opinion, the ICJ distinguished international organizations as derived legal persons from states, which are original legal persons. The ICJ reasoned:

[I]nternational organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations . . . are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.

Id.

16. For more on the constitutive and declaratory theories of recognition, see generally William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115 (2009).

violations¹⁷ or *ex injuria jus non oritur* considerations,¹⁸ apply to the constitution of non-state entities.¹⁹ Perhaps this lack of clarity results from the dearth of instances where non-state practices were considered inherent violations of international law. Generally, where an international organization violates international law, it is held responsible under international law, and such action of the organization does not affect the lawfulness of the organization's creation.²⁰ One can imagine a situation, however, where an organization or other non-state actor is created

17. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 141, ¶¶ 132–37 (July 22) (separate opinion by Cançado Trindade). See generally Gabčíkovo-Nagymaros Project (Hung./Slovak.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25); East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶¶ 28–32 (June 30); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 155–61 (July 9); HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 421 (2013) (first published in 1947); Int'l Law Comm'n, Articles on State Responsibility with Commentary, Rep. on the Work of its Fifty-Third Session, arts. 40–41, U.N. Doc A/56/10 (2001); S. Talmon, *The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES OBLIGATIONS (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); Martin Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 677, 683 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

18. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 270 (June 27); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment 1980 I.C.J. Rep. 3, ¶¶ 53–55, ¶¶ 62–63 (May 24); Diversion of Water from Meuse (Neth. v. Belg.), Judgment, 1937 P.C.I.J. (ser. A/B) No. 70 (June 28). See generally Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 76 (Apr. 5) (dissenting opinion by Anzilotti, J.); Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26); Mavrommatis Jerusalem Concessions (Gr. Brit. v. U.K.), Judgment, 1925 P.C.I.J. (ser. A) No. 5, ¶ 50 (Mar. 26); S.C. Res. 217, ¶ 3 (Nov. 20, 1965).

19. Of course, the Vienna Convention on the Law of Treaties (VCLT) suggests that it would (at least insofar as entities that are constituted by treaty). See Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; see also Int'l Law Comm'n, Draft Articles on the Responsibility of International Organizations, ¶ 87, U.N. Doc A/66/10 (2011). See generally Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat Int'l Found. v. Council of the Eur. Union & Comm'n, 2008 E.C.R. I-6351 (using *jus cogens* as a means for interpreting the scope of the act, and, not as a basis for invalidity).

20. See generally Int'l Law Comm'n, *supra* note 19.

for the express purpose of violating international law, perhaps even *jus cogens* norms.²¹ From a purely contractual-treaty perspective, such an act would oblige all other international legal persons to refuse to recognize the new person, but from an organic or constitutional perspective,²² we might find that the new person exists notwithstanding *ex injuria*, and its acts that contravene international law impose responsibility. Nonrecognition of a state in such a situation would be obligatory; but, what we see is that states continue to engage with an entity, such as a *de facto*, non-state authority not qualifying as a state, which perhaps may even contribute to the formation of international law, notwithstanding the *ex injuria* concerns, merely because the non-state entity is an entity capable of bearing certain basic international obligations. For these reasons, we do not usually draw close parallels between the laws on state recognition, or the obligation of nonrecognition, and the limited, relative, and functional recognition of other international legal persons.

II. INTERNATIONAL LEGAL PERSONALITY OF VARIOUS NON-STATE ACTORS

The article will now discuss the various non-state actors with claims to a certain degree of international legal personality and will identify where and how functional assessments are being made. This Part will also determine the resulting international rights and obligations of these non-state actors. At the outset, we will assess international organizations as non-state actors, which are viewed by the international community as having international legal personality on a functional basis. The article will then consider various other non-state actors and will determine, in order from least controversial to most controversial, the personality of these non-state actors, but will conclude for each

21. See *Waite & Kennedy v. Germany*, Eur. Ct. H.R. 1991-I (holding that a state may not pursue unlawful ends by incorporating an international organization); Int'l Law Comm'n, *supra* note 19, art. 28 (detailing that a state member of an international organization could be held responsible for providing a competence to the organization that would have breached international law if the state committed it).

22. For more information on the similarities and differences between the contractual and constitutional approaches, see Jean d'Aspremont, *The Law of International Organizations and the Art of Reconciliation: From Dichotomies to Dialectics*, 11 INT'L ORG. L. REV. 428 (2014).

actor that personality is consistently assessed on a functional basis.

A. International Organizations

It is widely understood that international organizations enjoy personality, but organizations are often understood to enjoy personality only in relation to the states that create them.²³ This subjective personality can be contrasted to cases where the organization is understood to have personality objectively in its relations with all states in the world, whether members or not, and whether recognized or not. Although the ICJ held in *Reparations* that the United Nations enjoyed objective personality vis-à-vis a state that was not a member, objective personality is not the dominant practice regarding the personality of other international organizations.²⁴ This does not mean that nonmembers cannot exercise the choice to recognize the personality of the international organization under special law, act, or agreement.²⁵ It simply means that international law does not require nonmembers to respect the personality of an international organization of which they are not a member.²⁶ Thus, the organization

23. See *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 178.

24. See *id.* at 187–88 (concluding that the United Nations has the capacity to sue a Member State on behalf of an injured agent, and holding that the United Nations, acting as an organization, may pursue an international claim against a state government to obtain reparations for damage suffered); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 30 (2d ed. 2006) (distinguishing between entities with objective legal personality, which exists “wherever the rights and obligations of an entity are conferred by general international law,” and those cases where an entity is created “by particular States for special purposes,” which binds only those states).

25. See, e.g., *Agreement on the Ariana Site*, July 1, 1946, 201 U.N.T.S. 153; *Exchange of Letters Constituting an Agreement on the Granting of Privileges to the Tribunal*, Mar. 4, 1988, 1526 U.N.T.S. 51; *Agreement Between the International Committee of the Red Cross and Switzerland to Determine the Legal Status of the Committee in Switzerland*, reprinted in 293 INT’L REV. RED CROSS 152 (1993) [hereinafter *Agreement to Determine the Legal Status of the ICRC in Switzerland*]; *Agreement Between the Republic of Austria and the Organization of the Petroleum Exporting Countries Regarding the Headquarters of the Organization of the Petroleum Exporting Countries*, Feb. 18, 1974, 2098 U.N.T.S. 416.

26. See *Cass., Eur. Univ. Inst. v. Piette*, 18 marzo 1999, n. 140 (It.), *Guist. Civ.*, 9 ITALIAN Y.B. INT’L L. 155, 156 (1999) (“[T]he provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the

can operate and is capable of holding rights and obligations under international law only in its relations with the states that create or interact with it.²⁷ While this relative personality might seem to create potentially awkward situations, most states will take a pragmatic view and will engage with the organization as an international legal person. When they do not, the relative links of rights and duties are not so different from other managed fragmented regimes, such as the law on reservations to multilateral treaties.²⁸

In addition, there are some cases where the very members of the organization might differ over whether to treat the entity as an international organization with international personality. There are various entities that are set up and function in fact, for example, by undertaking mundane tasks, such as contracting for office space, yet are not acknowledged to be international organizations, even by their own members. While it seems strange that a state might refuse to acknowledge the personality of an organization of which it is a member, these situations do occur. For example, entities such as the Organization for Security and

organization acquires legal personality under the municipal law of the contracting States"); Cour d'appel [CA] [regional court of appeal] Paris, Jan. 13, 1993, 1993 JDI 353 (Fr.) (stating that, without agreement, a non-Member State is under no obligation to grant immunity to a foreign international organization).

27. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS IN CONFLICT SITUATIONS 492 (2006); BROWNLIE, *supra* note 3, at 58. Arangio-Ruiz observes that personality does not arise through formality, but through actual interaction with states.

In their case, too, international legal personality does not flow from recognition by other subjects of international law or from the simple recognition of that international personality by the member states in the establishing treaty. It is only when the formal establishment of the IGO [intergovernmental organization] is followed by its effective possibility to act independently as a distinct subject that international legal personality actually ensues.

GAETANO ARANGIO-RUIZ, THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW 246 (1979); *see also* Agreement for the Establishment of the Joint Vienna Institute, Aug. 19, 1994, 2029 U.N.T.S. 391 (evidencing a treaty between purely international organizations).

28. Cf. VCLT, *supra* note 19, arts. 19–22 (providing for inter-subjective, relative, assessment of treaty reservation invalidity).

Co-operation in Europe (OSCE),²⁹ Commonwealth,³⁰ and even the European Union,³¹ defy our normal understandings of international organizations in their relations with their Member States.³² It is also unclear whether treaty regimes that create treaty organs, such as Conferences of States Parties and treaty secretariats, are international organizations or not. With respect to treaty regimes, potential disagreement exists between parties,³³ where some members might treat them as a *de facto* organizations and others might not. In the past, even constituent

29. See generally Jan Klabbers, *Institutional Ambivalence by Design: Soft Organizations in International Law*, 70 NORDIC J. INT'L L. 403 (2001) (discussing forms of cooperation apparently outside international law, e.g., OSCE).

30. See Memorandum of Understanding on Co-operation Between the Commonwealth Secretariat and the Office of the United Nations High Commissioner for Human Rights ¶ 1.3, Dec. 1, 1998, 2056 U.N.T.S. 389. Paragraph 1.3 demonstrates this unclear legal personality when it reads:

The Secretariat was established by Commonwealth Heads of Government as a visible symbol of co-operation between them, to promote consultation and exchange of opinions among member governments and, in furtherance of the 1991 Harare Commonwealth Declaration and related instruments of the association, to provide policy advice and assistance in support of the Commonwealth's fundamental political values, sustainable development and the promotion of international consensus.

Id.

31. See, e.g., Case C-6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 587, 593 (focusing on the pre-Lisbon treaty phase of the European Union's existence).

32. See, e.g., Jan Wouters & Sven Van Kerckhoven, *The OECD and the G20: An Ever Closer Relationship?*, 43 GEO. WASH. INT'L L. REV. 345, 346 (2011); Tarcisio Gazzini, *NATO's Role in the Collective Security System*, 8 J. CONFLICT & SEC. L. 231, 240–41 (2003) (noting that the treaty is silent on the international legal status of NATO).

33. Cf. *Arms Trade Treaty: United States Signs Arms Trade Treaty on September 25, 2013*, U.S. DEP'T STATE, <http://www.state.gov/t/isn/armstradetreaty/index.htm> (arguing that the new Arms Trade Treaty Secretariat will not be an international organization)

Key U.S. Redlines in the Negotiations: There will be no mandate for an international body to enforce an A[rms] T[rade] T[reaty] (ATT).

Parameters: No new international organization should be created to enforce an ATT. Exports will ultimately be a national decision.

organs of international organizations have acted independently of their organization on the international plane from time to time,³⁴ a practice that has been supported by certain members of the organization and which challenges our understanding of their organizational capacity. Therefore, it is possible for organizations to be subjective legal persons even in relation to their members.

More important for this article, certain entities can also acquire relative personality as an international organization by having functional relative personality (i.e., whether the entity

With Arms Trade Treaty, First Conference of States Parties, Arms Trade Treaty (ATT) Questionnaire for Candidate Cities, ATT Doc. No. ATT/CSP1/2015/INF.1 (Aug. 12, 2015) (answers of Trinidad and Tobago)(concluding the opposite of the United States, understanding the ATT treaty regime to be an international organization)

4. By virtue of its establishment, the Secretariat assumed certain attributes of an international organisation established by treaty such as independence; the possession of a legal personality; and the enjoyment of privileges and immunities. The Secretariat is an entity created by States Parties to assist them in fulfilling their responsibilities under the Treaty. . . .

5. Therefore, the Government of the Republic of Trinidad and Tobago envisages the establishment of an independent organisation that has the competence to contract for services with any other organisation such as, *inter alia*, United Nations Organisations, regional and international governmental organisations, universities, private sector entities and other suppliers. . . .

50. Consistent with the obligations it has assumed under the 1946 Convention on the Privileges and Immunities of the United Nations, the Government of the Republic of Trinidad and Tobago, in a Headquarters Agreement to be negotiated with the ATT Secretariat, will facilitate the extension of diplomatic-type privileges and immunities to specified senior officials of the Organization. It should be noted that similar privileges and immunities have been extended to other international organisations operating in Trinidad and Tobago.

Id.

34. See, e.g., Letter from the President of the International Court of Justice to the Minister for Foreign Affairs of the Netherlands (June 26, 1946), <http://www.icj-cij.org/documents/?p1=4&p2=5&p3=3>.

acts as if it is an international organization in its relations with one or more of its members).³⁵ This perspective even pertains to the states that are members of the international organization. In contrast to the subjective approach, the functional approach considers how the entity is treated and the role it fills to evaluate whether it has relative personality. If the entity functions as if it were an international organization, then it may be legally classified as such. It is well recognized that, while personality can be explicitly granted in an international organization's constitutive instrument,³⁶ it need not be, and personality might be implicit in the functions of the organization.³⁷ After all, the United Nations has international personality, even though the U.N. Charter does not make this status explicit.³⁸ Understanding that personality may be implicit, we then consider, to no avail, whether there is a universal definition of an international organization that can be applied objectively.³⁹ Notwithstanding the

35. See Joined Cases C-9/56 & C-10/56, *Meroni & Co. v. High Authority of the Eur. Coal & Steel Cmty.*, 1958 E.C.R. 133, 152–54; Joined Cases C-154/04 & C-155/04, *Alliance for Natural Health*, 2005 E.C.R. I-6514, ¶ 90; Arrangements for the Implementation of the Provisions of Article 11 of the United Nations Framework Convention on Climate Change Concerning the Financial Mechanism – Legal Capacity of the Conference of the Parties to the Convention and the Global Environment Facility to Enter into an Agreement or Other Arrangement with Third Parties and the Legal Nature of Such Agreement or Arrangement, 1993 U.N. JURID. Y.B. 427, 428–29 (Nov. 4, 1993); U.N. Framework Convention on Climate Change [UNFCCC], *Institutional and Budgetary Matters: Arrangements for Relocation of the Convention Secretariat to Bonn*, ¶¶ 7, 11(2), U.N. Doc. FCCC/SBI/1996/7 (Mar. 4, 1996) (holding that the UNFCCC Secretariat is not a subsidiary organ of the United Nations); U.N. Framework Convention on Climate Change [UNFCCC], Rep. of the Conference of the Parties on its Second Session, Part Two: Action Taken by the Conference of the Parties at its Second Session, Agreement Concerning the Headquarters of the Convention Secretariat, U.N. Doc. FCCC/CP/1996/15/Add.1, at 63 (Oct. 29, 1996) (providing that the UNFCCC Secretariat shall have legal personality in Germany); see also William Thomas Worster, *The Arms Trade Treaty Regime in International Institutional Law*, 36 U. PENN. INT'L L. 995 (2015).

36. See WHITE, *supra* note 10.

37. See *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 179.

38. See *id.* at 178.

39. This conclusion is also supported by the lack of a universal definition of “international organization.” See, e.g., HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* (4th ed. 2003); C. F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* (2d ed. 2005); Maurice Mendelson, *The Definition of ‘International Organization’ in the International Law Commission’s*

lack of a specific definition, the essential test for whether an entity is an international organization is if there is a grant of capacities with meaningful independence of action from control by the Member States.⁴⁰ In each case, we must determine whether the entity in question is recognized as, or treated as having, an international personality right or rights. Importantly, this exercise is case-specific, depending on the entity at issue,⁴¹ and the personality that results is limited to the functional right acknowledged.⁴² Thus, under the functional approach, one can understand an entity as having international legal personality to the extent necessary to execute its tasks.

The particular functions we assess in determining whether a non-state actor has personality are not entirely clear, but there are some likely candidates. Functions might include treaty-making power,⁴³ but could also include mundane tasks. For example, an entity that is recognized by agreement and has the ability to purchase office goods and perform other tasks requiring personality must have personality under some legal order, even though it is not incorporated under domestic law. Lacking compliance with the domestic legal order, we can only presume that the entity has international legal personality, despite the only consideration being, in this case, the bulk purchase of office paper. Furthermore, such a functional person will not have the full bundle

Current Project on the Responsibility of International Organizations, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 371, 372 (Maurizio Ragazzi ed., 2005). The definition of "international organization" continues to be subject of some debate, but most commentators agree at least that there must be a legal person created under international law with some degree of meaningful independent capacity from its members.

40. See, e.g., *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 178–79.

41. See *id.* at 178; Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 AM. J. INT'L L. 453, 475 (2000).

42. See *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 179; PORTMANN, *supra* note 1, at 106; MALCOLM SHAW, INTERNATIONAL LAW 196 (6th ed. 2008) ("Personality is a relative phenomenon varying with the circumstances."); BROWNLIE, *supra* note 3, at 67 ("The number of entities with personality for particular purposes is considerable.").

43. See, e.g., Vienna Convention on the Law of Treaties Between States and International Organizations, Mar. 21, 1986, U.N. Doc A/CONF.129/15 (not in force). For a discussion of international organizations and international legal personality more generally, see PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 474–536 (6th ed. 2009).

of international rights and abilities associated with the international legal personality of states because it is a limited and functional entity only. For example, the traditional view states that, although international organizations and other non-state actors can enter into international agreements, they cannot contribute to the formation of customary international law.⁴⁴ Specifically, the acts of international organizations and decisions of international tribunals do not qualify as constitutive *state practice*.⁴⁵ It is unclear, however, why an organization can create treaty obligations but not contribute to customary obligations.

B. Self-Determination Peoples, National Liberation Movements, and Indigenous Peoples

In addition to international organizations, a variety of other international actors can bear limited, relative, and functional international personality. This article will now turn to these more controversial actors, beginning with groups that have a natural connection to the territory in which they live and enjoy limited, relative international personality on that basis. At the outset, it might be helpful to recall that there is no reason, *a priori*, why there cannot be other international legal persons other than states and international organizations.⁴⁶ In principle, it is simply a choice of the international community which actors are considered international legal persons.

44. *But see, e.g.*, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 25 (May 28) (examining the depositary practice of the U.N. Secretary-General).

45. *But see* Barcelona Traction, Light & Power Co., Ltd. (Sp. v. Belg.), Judgment, 1970 I.C.J. Rep. 3, 315 (Feb. 5) (separate opinion by Ammoun, J.) (“[I]nternational case-law . . . [is] considered an element of [custom].”); Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y.B. INT’L L. 127, 142 (1937) (“[T]he creation of legal rules by custom by the action of the international judge is an incontestable positive fact.”).

46. *See* Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations, 2 Y.B. INT’L L. COMM’N 17, 22, U.N. Doc. A/CN.4/SER.A/1981/Add.1. *See generally* CLAPHAM, *supra* note 27; Peter H. Kooijmans, *The Role of Non-State Actors and International Dispute Settlement*, in FROM GOVERNMENT TO GOVERNANCE 21, 24–27 (2004).

First, international law recognizes "peoples" as holders of the right of self-determination⁴⁷ and provides a right to receive support in seeking independence from domination, which may even amount to a right to sovereignty.⁴⁸ If the test to be an international legal person is some functional vesting of an international right, then holding the right to self-determination may qualify.⁴⁹ An entity with some international rights can be considered an international legal person insofar as it holds those rights.

National Liberation Movements are also accorded certain international rights and duties and, thus, a degree of personality as a kind of agent of the territory they purport to liberate.⁵⁰ For purposes of self-determination, a "people" holds this right, and it is not clear that an NLM holds this right. It might be that an NLM seeks to represent the people and thus acts like an agent of the people. NLMs are capable of issuing binding unilateral statements with respect to their struggle with decolonization,

47. See *Port. v. Austl.*, 1995 I.C.J. ¶¶ 28–32; *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, 32–33 (Oct. 16); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. Rep. 16, 31 (June 21) [hereinafter *Legal Consequences for Continued Presence of South Africa in Namibia*]; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *International Covenant on Civil and Political Rights* art. 1, Dec. 1, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*]; *International Covenant on Economic, Social and Cultural Rights* art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*]; G.A. Res. 1514 (XV) (Dec. 14, 1960); G.A. Res. 2625 (XXV) (Oct. 24, 1970).

48. See *International Status of Southwest Africa*, Advisory Opinion, 1950 I.C.J. Rep. 128, 150 (July 11) (separate opinion by McNair, J.) (articulating that sovereignty is "in abeyance" and will "revive and vest in the new State"); PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 329–30 (1990); Gerry Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 *STAN. J. INT'L L.* 255, 285 (1996) ("International law can accommodate the various claims of the nation, the democratic polity, the indigenous group, the region, and the colony only when it appreciates the provisional and incomplete nature of all exercises of self-determination.").

49. See PORTMANN, *supra* note 1, at 272; T. Koivurova, *From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-Determination*, 15 *INT'L J. MINORITY & GROUP RTS.* 1, 24 (2008).

50. See G.A. Res. 33/41 (Dec. 14, 1978); G.A. Res. 35/29 (Nov. 11, 1980); G.A. Res. 3237 (XXIX) (Nov. 22, 1974); *Economic and Social Council Res. 1949 (LVIII)*, Rule 73 (May 8, 1975); *Human Rights Commission Res. CHR/Res.19 (XXIX)*; ANTONIO CASSESE, *INTERNATIONAL LAW* 140 (2005); R. Ranjeva, *Peoples and National Liberation Movements*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 101 (M. Bedjaoui ed., 1991); M. N. Shaw, *The International Status of National Liberation Movements*, 5 *LIVERPOOL L. REV.* 19 (1983).

especially statements pledging to be bound by the Geneva Conventions.⁵¹ For example, while sometimes spoken of as a Memorandum of Understanding, the ICJ appeared to consider the Oslo Accords a binding legal instrument.⁵²

The Palestinian Liberation Organization (PLO) is a clear example of an NLM that attained international legal personality.⁵³ Initially a project under significant guidance by Egypt, the PLO quickly shifted to independent operation under Yasser Arafat's Fatah organization.⁵⁴ By 1969, the PLO acquired governance and *de facto* sovereignty over Palestinian refugee camps in Lebanon under the Cairo Agreement.⁵⁵ Five years later, the Arab League acknowledged the PLO as the sole international representative of the Palestinian people, which became a U.N. observer shortly thereafter.⁵⁶ In 1989, the PLO declared independence⁵⁷ and entered into the Oslo Accords with Israel in 1993.⁵⁸ The PLO has since exercised rights of consent and the use of

51. See, e.g., Declaration by União Nacional para a Independência Total de Angola (UNITA), July 25, 1980, *reprinted in* 20 INT'L REV. RED CROSS 320 (1980); INT'L COMM. OF THE RED CROSS, ANNUAL REPORT 1977, at 16 (1978); African National Council-Zimbabwe African People's Union (ANC-ZAPU), *Undertaking*, in INT'L COMM. OF THE RED CROSS, ANNUAL REPORT 1975, at 8 (1976).

52. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at 138.

53. See Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. Rep. 12 (Apr. 26); SHAW, *supra* note 42, at 247–48 (“While Palestinian statehood has clearly not been accepted by the international community, the Palestinian Authority can be regarded as possessing some form of limited international personality. Such personality, however, derives from the agreements between Israel and the PLO and exists separately from the personality of the PLO as an NLM, which relies upon the recognition of third parties.”); see also G.A. Res. 2248 (S-V) (May 19, 1967) (creating the Council for Namibia, a subsidiary organ of the U.N. General Assembly that served as the Administering Authority of the Trust Territory).

54. See HELENA COBBAN, THE PALESTINIAN LIBERATION ORGANIZATION: PEOPLE, POWER AND POLITICS 43 (1984).

55. See *id.*

56. See G.A. Res. 3237, *supra* note 50.

57. See Permanent Rep. of Jordan to the U.N., Letter dated 18 November 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, U.N. Doc. A/43/827, S/20278 (Nov. 18, 1988); G.A. Res. 43/177 (Dec. 15, 1988).

58. Declaration of Principles on Interim Self Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525.

armed force.⁵⁹ In addition, it issued commitments with respect to human rights law⁶⁰ and has been held to be bound to human rights law as a state-like entity.⁶¹

Nonetheless, even though an entity has the capacity to enter into international agreements does not necessarily mean it can also participate in the creation of customary international law.⁶² Here, just as with international organizations, states continue to monopolize the field.⁶³ Yet, the United Nations recently granted the PLO the right to exercise quasi-diplomatic protection over several thousand Palestinian claimants before the U.N. Compensation Commission simply because of the pragmatic need for an authority to represent them.⁶⁴ This practice was recognized, despite the fact that, formally, only states can assert these claims.⁶⁵ Thus, an NLM can exercise partial international rights and create international law through only one of the classic sources of international law in the Statute of the International Court of Justice ("ICJ Statute"): treaty law.

In addition to "peoples" (for purposes of self-determination) and NLMs, there is also the category of indigenous peoples. This group is not the same as the "people" for self-determination, which would normally include all of the people of a state. This group is usually a minority or other distinctive collection of individuals within a state that has a particular, historic connection to the territory. While they are not NLMs, indigenous peoples still hold some international rights, albeit in a more limited

59. See COBBAN, *supra* note 54, at 43.

60. See Human Rights Council, Rep. of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, ¶ 44, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015) [hereinafter H.R.C. Rep. Pursuant to Res. S-21/1].

61. See *id.* ¶ 45.

62. See ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 176 (1999).

63. This conclusion excludes NLMs or other peoples' groups that also qualify as insurgents or belligerents. In these latter categories, they might have a stronger argument that their practice should be considered as contributing to customary international law, at least in the field of international humanitarian law.

64. See Rep. of the S.C., at 4, U.N. Doc. S/AC.26/2003/26 (2003).

65. See *id.*

way.⁶⁶ The ICJ, U.N. High Commissioner for Human Rights,⁶⁷ and several states (at least historically) provide that indigenous peoples can be party to international agreements.⁶⁸

66. See Treaty of Peace Between France and the Iroquois Indians of the Nation of Tsonnotuan (North America), May 22, 1666, 9 Consol. T.S. 163; Treaty with the Cherokees, June 26, 1794, 7 Stat. 43; Treaty with the Sioux, etc., Aug. 19, 1825, 7 Stat. 272; Treaty of Cession Between Great Britain and New Zealand, U.K.-N.Z., Feb. 6, 1840, 89 Consol. T.S. 473; Treaty with the Potawatomi, Feb. 27, 1867, 15 Stat. 531; Treaty with the Navaho, June 1, 1868, 15 Stat. 667; Cayuga Indians (Great Britain) v. United States, 6 R.I.A.A. 173, 176, 189 (U.S.-Brit. Arb. Trib. 1926) (holding that a violation of a treaty with Cayuga is enforceable due to “considerations of justice, equity, and right . . . and received principles of international law.”); *N.Z. Maori Council v. Att’y Gen. of N.Z.*, [1994] 1 NZLR 513 (PC) 517 (N.Z.); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176 (1999); G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); JAMES L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 118–19 (Humphrey Waldock ed., 6th ed. 1963); David Derham, *Theories of Legal Personality*, in *LEGAL PERSONALITY AND POLITICAL PLURALISM* 1 (Leicester C. Web ed., 1958); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 18 n.106, 20–21 nn.117–21 (1999).

67. See Press Release, U.N. High Commissioner for Human Rights, U.N. Rights Chief Navi Pillay Urges States to Do More to Respect Treaties with Indigenous Peoples (Aug. 7, 2013), <http://www.un.org/esa/socdev/unpfii/documents/ip-day/2013/ohchr.pdf>. Chief Navi Pillay argued:

States need to do more to honour and strengthen their treaties with indigenous peoples, no matter how long ago they were signed. . . . “Even when signed or otherwise agreed more than a century ago, many treaties remain the cornerstone for the protection of . . . human rights today. . . . The honouring of treaties has in many cases been described as a sacred undertaking requiring good faith by each party for their proper enforcement. . . . I encourage States to take concrete steps to honour and strengthen the treaties they have concluded with indigenous peoples and to cooperate with them in implementing new agreements or other constructive arrangements through transparent, inclusive and participatory negotiations. . . .”

Id.

68. See *Western Sahara*, 1975 I.C.J. ¶¶ 75–84. In addition, states that supported the U.N. Declaration on the Rights of Indigenous Peoples implicitly expressed in *opinio juris* that agreements with indigenous peoples could, in some

The ICJ, however, refuses to hold that these entities are states,⁶⁹ leading to the conclusion that these collective non-state actors are a special case of legal person and at least have sufficient personality for certain agreements. For example, Article 3 of the Vienna Convention on the Law of Treaties (VCLT) did not exclude the treaty-making capacity for non-state entities and, by doing so, perhaps, implicitly confirmed it.⁷⁰ But, there continues to be a lack of a clear definition of indigenous people as a non-state entity.⁷¹ Each situation of indigenous people is treated on a case-by-case basis, with differing arrangements and differing outcomes following decolonialization, which resulted in inconsistent practice. Some of these groups were initially regarded as having international capacity but were later conquered and

instances, be considered "treaties." See G.A. Res. 61/295, *supra* note 66 ("Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other arrangements concluded with States or their successors and to have States honour and respect such."). The use of the term "treaty" alongside "agreements and other arrangements" strongly suggests the use of the same legal definitions in the VCLT. See also *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. . . . The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."); *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (citing *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900)) ("[O]ur [the court's] 'duty [i]s to ascertain the intent of the parties' by looking to the document's text and context."). *Choctaw Nation* was a case about "treaties" between the United States and various Native American tribes, suggesting that even the current U.S. Supreme Court implicitly views those "treaties" as treaties equivalent to those undertaken under international law. See also *Ngati Apa v. Attorney-General*, [2003] NZCA 117 (N.Z.).

69. See *Land and Maritime Boundary Between Cameroon & Nigeria* (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, ¶¶ 205–07 (Oct. 10) ("In the view of the Court many factors point to the 1884 Treaty signed with the Kings and Chiefs of Old Calabar as not establishing an international protectorate. It was one of a multitude in a region where the local Rulers were not regarded as States.").

70. VCLT, *supra* note 19, art. 3.

71. See G.A. Res. 61/295, *supra* note 66; Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 1, June 27, 1989, 28 I.L.M. 1382 (1989). See generally Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998).

their separate personality extinguished.⁷² Some actually maintained their international capacity in dormancy during colonialism only to reassert it following decolonialization,⁷³ while others attempted to assert their personality following decolonialization only then to lose it definitively.⁷⁴ Some entities were able to maintain sovereign capacity for a considerable period before becoming absorbed by stronger neighbors.⁷⁵ Some maintained a

72. *See, e.g.*, Agreement Between the Netherlands and Bandjermasin, Dec. 18, 1660, 227 Consol. T.S. 181; Convention Between Great Britain and Mosquito, June 25, 1720, 31 Consol. T.S. 233; Armistice Between Spain and Portugal and the Cacique Indians, Nov. 14, 1754, 40 Consol. T.S. 233; Treaty Between France and the Chiefs of Dakar Respecting Wrecks, Oct. 10, 1826, 76 Consol. T.S. 423; Engagement Between Great Britain and the King of Caleba (Gambia), May 7, 1827, 77 Consol. T.S. 179; Treaty Between Great Britain and Biafra (Nigeria), June 24, 1827, 77 Consol. T.S. 285; Convention of Friendship and Commerce Between France and Old Calabar, Aug. 30, 1842, 93 Consol. T.S. 475; Agreement Between Great Britain and the Chiefs of Old Calabar and the Delegates of Slaves of the Qua Plantations (Nigeria), Feb. 15, 1851, 106 Consol. T.S. 183-1; Treaty of Friendship and Commerce Between France and Dahomey, July 1, 1851, 106 Consol. T.S. 73; Treaty Between Great Britain and the Sultan of Sokoto (Central Africa), May 2, 1853, 110 Consol. T.S. 267; Agreement of Peace, Friendship, Slave Trade etc. Between Great Britain and the Sheiks of the Habr Owul (Somaliland), Nov. 7, 1856, 116 Consol. T.S. 43; Commercial Convention Between France and the Touareg Chiefs (West Africa), Nov. 26, 1862, 125 Consol. T.S. 64; Engagement Between Great Britain and the Kings and Chiefs of the River Congo (West Africa), June 6, 1865, 130 Consol. T.S. 68; Protectorate Treaty Between France and Sokolo (Africa), Apr. 22, 1887, 169 Consol. T.S. 13; Protectorate Treaty Between France and Konga (Africa), Oct. 12, 1888, 170 Consol. T.S. 342; Protectorate Treaty Between France and Abrou and Bondoukou (Africa), Nov. 13, 1888, 170 Consol. T.S. 359; Treaty Between Great Britain and Kawinga, Chief of Chikala and Country (Nyasa) (Africa), June 15, 1891, 174 Consol. T.S. 428; Protectorate Treaty Between France and the Chief of Blé (Africa), Oct. 27, 1894, 179 Consol. T.S. 362-1.

73. *See, e.g.*, Terms of a Maritime Truce for Ten Years Between Great Britain and the Chiefs of the Arabian Coast, June 1, 1843, 95 Consol. T.S. 53; Treaty Between Great Britain and Mwanga, King of Uganda (Africa), Aug. 27, 1894, 179 Consol. T.S. 374.

74. *See, e.g.*, Extradition Treaty Between Great Britain and Hyderabad, May 8, 1867, 133 Consol. T.S. 378; Treaty Between Great Britain and the Maharaja of Kashmir and Jammu, Apr. 2, 1870, 140 Consol. T.S. 158; Imperial Service Troops Agreement Between Great Britain and Mysore, June 24, 1899, 187 Consol. T.S. 364; Agreement Respecting Extradition to and from Berar Between Great Britain and Hyderabad, Nov. 29, 1910, 212 Consol. T.S. 326.

75. *See, e.g.*, Treaty Between Great Britain and the Maharajah of Sikkim, Mar. 28, 1861, 123 Consol. T.S. 266; Agreement Between Great Britain and the Sandwich Islands, July 31, 1843, 95 Consol. T.S. 205; Convention Between Hawaii and Portugal for the Provisional Regulation of Relations of Amity and

modified and domesticated version of their capacity with lingering, though limited, capacity,⁷⁶ whereas others maintained only a pretense to international capacity and today have merely a symbolic status (usually in the form of a continuing traditional "ruler").⁷⁷ Yet, this practice is consistent in that each case was approached functionally. Each situation was assessed as a unique practical case, largely led by concerns over how the territory was functionally operating at the time rather than as a class of cases, and, in this process, the states reached functional, pragmatic solutions.

One difficulty with determining personality in indigenous groups lies in assessing whether that personality is "original" or "derived." States are understood to be original persons because they are not created by other international legal persons. Their existence is primarily a question of fact, resulting from historical processes. International organizations, on the other hand, are created by states, and derive their personality and powers from the states creating them. But, "peoples," NLMs, and indigenous peoples are not classified as original or derived persons. In one sense, they are as "original" as states. Clearly, they are not created in fact by states but are instead constituted through their

Commerce, May 5, 1882, 160 Consol. T.S. 209; Convention of Commerce and Navigation Between Hawaii and Russia, June 7 (19), 1869, 139 Consol. T.S. 351; Postal Convention Between New South Wales (Great Britain) and Hawaii, Mar. 10, 1874, 147 Consol. T.S. 84; Treaty of Amity, Commerce and Navigation Between Belgium and Hawaii, Oct. 14, 1862, 126 Consol. T.S. 329; Treaty of Amity, Commerce and Navigation Between France and the Sandwich Islands (Hawaii), Oct. 29, 1857, 117 Consol. T.S. 435.

76. *See, e.g.*, Treaty of Alliance Between Spain and the Choctaw etc. (North America), July 14, 1784, 49 Consol. T.S. 107; Treaty of Alliance and Commerce Between Great Britain and the Cherokee North American Indians, Sept. 20, 1730, 33 Consol. T.S. 277; Treaty of Peace and Alliance Between Spain and the Cherokee (North America), Oct. 28, 1793, 52 Consol. T.S. 175; Treaty of Cession Between Great Britain and New Zealand (Treaty of Waitangi), Feb. 5, 1840, 89 Consol. T.S. 473.

77. *See, e.g.*, Treaty Between Great Britain and Ashantee, Sept. 7, 1817, 68 Consol. T.S. 5; Treaty Between Great Britain and the King, Chiefs and Elders of the People of Ife (Africa), May 22, 1888, 170 Consol. T.S. 387; Treaty Between Great Britain and Igabo (West Africa), Jan. 8, 1885, 165 Consol. T.S. 51; Agreement Between Great Britain and the King of the Abaqua Zooloo (South Africa), Mar. 3, 1836, 86 Consol. T.S. 29; Treaty Between Great Britain and the King of the Zulus (South Africa), May 6, 1835, 85 Consol. T.S. 127; Treaty Between Great Britain and the Zoolah Nation (Southern Africa), Oct. 5, 1843, 95 Consol. T.S. 477-1.

own original historical process. Yet, they need recognition as such in order to access those international rights, and those rights are arguably created by states. The prevailing view is that an indigenous group or NLM must be recognized as such in order to operate as a legal person.⁷⁸ For this reason, the classic constitutive-declaratory theory argument on statehood⁷⁹ seems to apply by analogy. Upon becoming a qualifying group, however, indigenous people do not accrue the full range of international rights comparable to a state but rather a limited range of rights connected to the function of being an indigenous group. They also do not accrue the rights of self-determination enjoyed by that distinct grouping. Thus, we find again that these kinds of entities can exist as relative, functional persons.

C. Non-State Groups Participating in Armed Conflict

Sometimes overlapping with decolonization and NLMs, but at other times not linked to those phenomena, are insurgents, beligerents, and combatants. These entities all have some degree of effective control of territory through military means and are acknowledged as persons with whom the international community can with engage on the international plane. These entities are highly organized (e.g., they might even adopt internal “legislation”⁸⁰) and often resemble states. States may engage with them, but, for reasons such as mandatory *ex injuria* nonrecognition, they cannot acquire the legal rights that come with full personality or statehood recognition.⁸¹

78. SHAW, *supra* note 42, at 247–48 (“[P]ersonality . . . as an NLM . . . relies upon the recognition of third parties.”).

79. See generally Worster, *supra* note 16.

80. See, e.g., Liberation Tigers of Tamil Eelam, Tamil Eelam Child Protection Act (Act No. 3 of 2006); Communist Party of Nepal–Maoist, Public Legal Code 2060 (2003/2004).

81. See SCOTT PEGG, INTERNATIONAL SOCIETY AND THE DE FACTO STATE 26 (1998). Michael Schoiswohl notes:

Still, D[e] F[acto] R[egimes] [(DFRs)] are not accorded full I[n]ternational L[egal] P[ersonality]. Governments seem to find it necessary to express their disapproval of these regimes by not (fully) including them in international decision-making. Such policies will continue to prevent DFRs from being fully operational international actors, blocking meaningful cooperation with them and making it impossible to expect their full adherence to international norms.

International legal doctrine recognizes that insurgents and belligerents in armed conflict directly bear rights and duties under international law.⁸² The most important duties are derived from international humanitarian law,⁸³ but they may also be sourced in human rights law.⁸⁴ Some authorities maintain a distinction that only states can be liable under human rights law,

MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED DE FACTO REGIMES IN INTERNATIONAL LAW: THE CASE OF 'SOMALILAND' 90 (2004).

82. See Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287; Inter-American Convention on Duties and Rights of States in the Event of Civil Strife art. 1(3), May 1, 1957, 134 L.N.T.S. 45; *Final Declaration of the Geneva Conference: On Restoring Peace in Indochina*, 31 DEP'T STATE BULL. 164 (1954); Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, 31 I.L.M. 174 (1992); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 149 (1978); *Oriental Navigation Co. (U.S.) v. Mexico*, 4 R.I.A.A. 323, 341, 346 (Perm. Ct. Arb. 1978) (Nielsen, dissenting). Judge Nielsen argued:

The recognition of a new state, that is, the acceptance by members of the family of nations of a new member, an international person, is regarded by Governments as a political question, although the act of recognition should of course be grounded on a sound legal basis. . . . This of course is not a case of the recognition of an international person. So it seems to me that the recognition of a state of belligerency, so-called, on the part of governments involves very largely political considerations.

Oriental Navigation Co., 4 R.I.A.A. at 341, 346; see also *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998); *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 49 (2d Cir. 1991); SHAW, *supra* note 42, at 219–20, 1040–41 (observing that the concepts of insurgency and belligerency are not easily distinguishable); CASSESE, *supra* note 50, at 124–26, 140–142; BROWNIE, *supra* note 3, at 63 (noting that insurgents and belligerents are both considered subjects entitled to enter into legal relations on the international plane); STEPHEN C. NEFF, THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY 200 (2000); BRIERLY, *supra* note 66, at 133–35.

83. See *A Guide to State Practice Concerning International Humanitarian Law*, 3 Y.B. INT'L HUMANITARIAN L. 518–19 (2000) (reporting on a Hungarian Supreme Court decision applying common Article 3 to the unrest in 1956).

84. See *Ahmed v. Austria*, 1996-VI Eur. Ct. H.R., ¶¶ 10, 44, 47 (finding that a *de facto* regime could commit human rights violations); S.C. Res. 1193, ¶ 14 (Aug. 28, 1998); S.C. Res. 1213, ¶ 7 (Dec. 3, 1998); JEAN PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED

whereas both states and armed groups can be liable under international humanitarian law. Thus, non-state groups cannot formally “violate” human rights but instead can simply commit “abuses.”⁸⁵ In seeking to place responsibility, some authorities would exempt the non-state group from collective responsibility and instead would assign responsibility to another state or state-like actor that should have protected the population from mistreatment.⁸⁶ The drive to extend the application of human rights law, however, is functional—to have the ability to document and identify mistreatment committed by non-state actors, and not just states.⁸⁷ One technique for applying human rights law in-

FORCES IN THE FIELD 51–52 (1952); LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 48 (2002).

85. See, e.g., Human Rights Council Res. S-22/1, ¶ 1, U.N. Doc. A/HRC/RES/2-22/I (Sept. 1, 2014). The Human Rights Council condemned

in the strongest possible terms the systematic violations and abuses of human rights and violations of international humanitarian law resulting from the terrorist acts committed by the so-called Islamic State in Iraq and the Levant and associated groups [that] t[ook] place since 10 June 2014 in several provinces of Iraq, which may [have] amounted to war crimes and crimes against humanity, and strongly condemn[ed] in particular all violence against persons based on their religious or ethnic affiliation, as well as violence against women and children.

Id.; see also N. Rodley, *Can Armed Opposition Groups Violate Human Rights?*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY 297–318 (Kathleen Mahoney & Paul Mahoney eds., 1993).

86. See H.R.C. Rep. Pursuant to Res. S-21/1, *supra* note 60, ¶ 50. The commission was of the

view that inmates were transferred out of the prison and summarily executed with the apparent knowledge of the local authorities in Gaza, in violation of their obligation to protect the right to life and security of those in their custody. These extrajudicial executions, many of which were carried out in public, constitute a violation of both international humanitarian law and international human rights law.

Id.

87. See, e.g., Andrew Clapham, *Focusing on Armed Non-State Actors*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 766–810 (Andrew Clapham & Paola Gaeta eds., 2014); Amnesty Int’l, *Palestine (State of): ‘Strangling Necks’ Abductions, Torture and Summary Killings of Palestinians*

sists that non-state groups comply with any previous commitments that they made to follow human rights law.⁸⁸ An additional technique consists of identifying human rights norms that conventional law specifically extends to non-state actors.⁸⁹ In some instances, the U.N. Security Council is relied upon as a substitute for a treaty.⁹⁰ The difficulty with this approach is that the language of the resolutions does not prescribe human rights for the actors by its own legal act; instead, the resolutions usually conclude that the group violated human rights law, suggesting that the law was somehow already in existence and applicable to the actor at the time of the violation.⁹¹ The final technique asserts that all actors are held to *jus cogens* norms whether or not the groups are subject to human rights law in the same way as states.⁹² Since the list of *jus cogens* norms is indeterminate, this approach could include a wide spectrum of human rights protections.⁹³ The more controversial approach includes assimilating the non-state actor to a state and designating it as a *de facto*, state-like entity, while also denying that it is a state, thus requiring it to comply with human rights norms just like a state.⁹⁴ After all, non-state armed groups are considered to have

by Hamas Forces During the 2014 Gaza/Israel Conflict, at 35–37, AI Index MDE 21/1643/2015 (May 26, 2015).

88. See, e.g., Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 106–07, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

89. See *id.* ¶ 44.

90. See, e.g., S.C. Res. 2231 (July 20, 2015) (endorsing the non-binding agreement on the Iranian nuclear program, Joint Comprehensive Plan of Action (July 14, 2015), U.N. Doc. S/2015/544).

91. See, e.g., S.C. Res. 2139, ¶ 1 (Feb. 22, 2014); S.C. Res. 2088, ¶ 13 (Jan. 24, 2013); S.C. Res. 1882, ¶ 14 (Aug. 4, 2009); S.C. Res. 2031, ¶ 13 (Dec. 21, 2011).

92. See, e.g., Tilman Rodenhäuser, *International Legal Obligations of Armed Opposition Groups in Syria*, INT'L REV. L., no. 1, 2015, at 1, <http://www.qscience.com/doi/pdf/10.5339/irl.2015.2>.

93. See, e.g., Human Rights Council, Rep. of the U.N. High Commissioner for Human Rights on the Situation of Human Rights in Mali, U.N. Doc. A/HRC/22/33 (2012) (documenting violations of human rights by non-state actors).

94. See, e.g., H.R.C. Rep. Pursuant to Res. S-21/1, *supra* note 60, ¶ 45 (“[I]t is worth recalling that non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.”); Ben Emmerson (Special Rapporteur on the Promotion and Protec-

the capacity to undertake state-like organizational policy to commit crimes against humanity.⁹⁵ Thus, the extension of human rights law to non-state armed groups has a major effect for determining personality. This pragmatic solution gives new appreciation to the way that international persons, such as states and the United Nations, engage with armed groups, perhaps giving those groups limited, functional personality.⁹⁶

Engaging with these groups in this way, however, implies that the groups may be able to argue for a role in shaping the applicable norms.⁹⁷ Many agreements exist between states and non-state insurgent actors⁹⁸ or between the United Nations and non-

tion of Human Rights and Fundamental Freedoms while Countering Terrorism), *Fourth Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶¶ 30–31, U.N. Doc. A/HRC/29/51 (2015) (concluding that the Islamic State in Iraq and the Levant is obliged to respect human rights).

95. See *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(1) and (b) of the Statute (Jan. 23, 2012); *Prosecutor v. Nikolić*, IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 20, 1995).

96. See generally GERARD MCHUGH & MANUEL BESSLER, *HUMANITARIAN NEGOTIATIONS WITH ARMED GROUPS: A MANUAL FOR PRACTITIONERS, AND GUIDELINES ON HUMANITARIAN NEGOTIATIONS WITH ARMED GROUPS* (2006).

97. See Marco Sassòli, *Involving Organized Armed Groups in the Development of the Law?*, in *NON-STATE ACTORS AND INTERNATIONAL HUMANITARIAN LAW. ORGANIZED ARMED GROUPS: A CHALLENGE FOR THE 21ST CENTURY* 213–21 (2010).

98. See, e.g., Agreement on the Civilian Protection Component of the International Monitoring Team Between the Government of the Republic of the Philippines and the International Monitoring Team, Oct. 27, 2009, <http://peacemaker.un.org/philippines-agreemen-cpc2009>; Agreement on a Permanent Ceasefire Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Feb. 23, 2008, <http://peacemaker.un.org/uganda-permanent-ceasefire2008>; Protocol Between the Government of the Sudan, SLM/A and the Justice and Equality Movement on the Improvement of the Humanitarian Situation in Darfur, Nov. 9, 2004 [hereinafter Protocol on the Improvement of the Humanitarian Situation in Darfur], <http://reliefweb.int/report/sudan/protocol-between-govt-sudan-sлма-and-justice-and-equality-movement-improvement>; Agreement Between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, Mar. 10, 2002, http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_020331_Agreement%20to%20Protect%20Non-Combatant%20Civilians%20from%20Military%20Attack.pdf; Humanitarian

state insurgent actors.⁹⁹ This practice is specifically encouraged by Common Article 3 of the Geneva Conventions, although the precise legal value of treaty-type agreements with such entities is unclear.¹⁰⁰ In many of these agreements, the parties do not undertake new obligations¹⁰¹ but instead “reaffirm” their existing obligations under international law.¹⁰² Ultimately, many of these agreements have been applied as treaties.¹⁰³ In at least one

Exchange Agreement Between Colombia and the Fuerzas Armadas Revolucionarias de Colombia (FARC), June 2, 2001, http://www.c-r.org/downloads/Agreement%2014_16Key%20texts%20and%20agreements_2004_ENG.pdf; Comprehensive Agreement on Human Rights, Mar. 29, 1994, <http://peacemaker.un.org/guatemala-humanrightsgreement94>; Liberia: Cotonou Agreement, July 25, 1993, <http://www.refworld.org/docid/3ae6b5796.html>; Agreement on Human Rights, Annex to Note Verbale dated 14 August 1990 from the Charge d'affaires a.i. of the Permanent Mission of El Salvador to the United Nations Addressed to the Secretary-General, U.N. GAOR, 44th Sess., Annex, Agenda Item 34, U.N. Doc. A/44/971-S/21541 (1990).

99. See, e.g., Memorandum of Understanding Between the Government of Sudan, SPLM and the UN Regarding UN Mine Action Support to Sudan, Sept. 19, 2002, <http://reliefweb.int/report/sudan/memorandum-understanding-between-govt-sudan-splm-and-un-regarding-un-mine-action>.

100. See generally *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on the Admissibility of the Case Under Art. 19(1) of the Statute (Mar. 10, 2009).

101. See, e.g., Comprehensive Ceasefire Agreement Between the Government of the Republic of Burundi and the Palipehutu-FNL, Sept. 7, 2006, <http://peacemaker.un.org/node/127>; Darfur Peace Agreement, May 5, 2006, http://www.sudantribune.com/IMG/pdf/Darfur_Peac_Agreement-2.pdf; Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for the Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL), Aug. 18, 2003 [hereinafter *Peace Agreement Between LURD and MODEL*], http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf; Agreement on a Ceasefire Between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam, Feb. 22, 2002, <http://www.usip.org/publications/peace-agreements-sri-lanka>; Uganda Peace Talks Agreement for the Restoration of Peace to the Sovereign State of the Republic of Uganda, Dec. 17, 1985, <http://peacemaker.un.org/uganda-peace-talks85>; cf. Peace Agreement Between the Government of the Republic of Sierra Leone and the RUF/SL (Abidjan Peace Agreement), Nov. 30, 1996, <http://peacemaker.un.org/sierraleone-peace-agreement-RUF96> (providing expressly for new human rights obligations).

102. See, e.g., Protocol on the Improvement of the Humanitarian Situation in Darfur, *supra* note 98; CPN-M, Appeal of the Communist Party of Nepal (Maoist) (Mar. 16, 2004); Peace Agreement Between LURD and MODEL, *supra* note 101.

103. See, e.g., Int'l Comm'n of Inquiry on Darfur, Rep. of the Int'l Comm'n of Inquiry on Darfur to the Secretary-General Pursuant to S.C. Res. 1564 of 18

case, an armed group successfully acceded to a treaty,¹⁰⁴ even though this ability is not formally recognized and would normally require the group to be considered a person with capacity to enter into the treaty.¹⁰⁵

Some of these groups have also been understood to have the capacity to issue binding unilateral statements, especially promises to comply with international humanitarian law.¹⁰⁶ Some of

September 2004, ¶ 174, U.N. Doc. S/2005/60 (Jan. 25, 2005). The International Commission noted:

[T]he SLM/A [Sudan Liberation Movement/Army] and the JEM [Justice and Equality Movement] possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRD [National Movement for Recovery and Development] concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

Id.; see also S.C. Res. 1127 (Aug. 28, 1997) (regarding UNITA and the Lusaka Protocol).

104. See *Instruments of Accession of the Algerian Republic to the Geneva Conventions of August 12, 1949*, in M. BEDJAOUI, *LAW AND THE ALGERIAN REVOLUTION* 199 (1961) (stating that the instrument was deposited by the Provisional Government of Algeria prior to attaining effective control or international recognition); cf. Nat'l Democratic Front of the Phil. [NDFP], *Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977*, NDFP.ORG (July 5, 1996), <https://www.ndfp.org/ndfp-declaration-of-undertaking-to-apply-the-geneva-conventions-of-1949-and-protocol-i-of-1977/> (declaring that the National Democratic Front of the Philippines will merely apply the conventions but will not attempt to adhere to the conventions).

105. See *Prosecutor v. Kallon & Kamara*, SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 45–50 (Mar. 13, 2004). But see A. Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2 J. INT'L CRIM. JUST. 1130, 1134–35 (2004).

106. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ¶ 91 (noting the PLO declaration); *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, ¶ 627 (Sept. 2, 1998) (noting the Rwandese Patriotic Front declaration to the International Committee of the

these promises were made to the International Committee of the Red Cross (ICRC)¹⁰⁷ and others to the United Nations.¹⁰⁸ More important than these specific agreements or unilateral commitments, however, is whether the practice of non-state actors contributes to customary international law. Some scholars and courts look to the practice of non-state actors to establish or prove the rules of customary international law.¹⁰⁹ For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) has taken into account the practice of non-state actors in

Red Cross (ICRC)); Philip Alston (Special Rapporteur), *Rep. on Civil and Political Rights, Including the Question of Disappearances and Summary Executions*, ¶ 30, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006); Olara Otunnu (Special Rapporteur), *Additional Rep. of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 20, U.N. Doc. E/CN.4/2000/71 (Feb. 9, 2000); UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN [UNAMA], AFGHANISTAN: MIDYEAR REPORT 2011 PROTECTION OF CIVILIANS IN ARMED CONFLICT 11–13 (2011) (documenting the Taliban's declarations and Code of Conduct).

107. See, e.g., B. W. Ndiaye (Special Rapporteur), *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*, ¶ 26, U.N. Doc. E/CN.4/1994/7/Add.1 (Aug. 11, 1993) ("For its part, the FPR [Rwandese Patriotic Front] has stated to the International Committee of the Red Cross that it considers itself bound by the rules of international humanitarian law."); INT'L COMM. OF THE RED CROSS, ANNUAL REPORT 1985, at 36 (1986), https://library.icrc.org/library/docs/RA_CICR/RA_1985_ENG.pdf; INT'L COMM. OF THE RED CROSS, ANNUAL REPORT 1967, at 36 (1968), https://library.icrc.org/library/docs/RA_CICR/RA_1967_ENG.pdf.

108. See, e.g., Letter from Velumylum Manoharan, Representative, Liberation Tigers Tamil Eelam International Secretariat, to the U.S. Court of Appeals for the D.C. Circuit (Nov. 16, 1997), <http://www.sundaytimes.lk/971116/news2.html>; PKK Statement to the United Nations (Jan. 24, 1995), <http://www.hartford-hwp.com/archives/51/009.html>; NDFP, *supra* note 104.

109. See *Western Sahara*, 1975 I.C.J. at 100 (separate opinion by Ammoun, J.); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 74 (dissenting opinion by Ammoun, J.) ("If there is any 'general practice' which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1 (b), of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle [for self-determination]."); L. C. CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 344 (2d ed. 2000); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Non-state Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 118–19 (2012).

assessing customary international law (albeit, in a limited manner).¹¹⁰ Since the ICJ Statute only requires that the practice be accepted as law and does not limit acceptance of the provision to states,¹¹¹ there may be some plausibility to this argument.¹¹² Some have even suggested that non-state armed groups are developing their own law of armed conflict parallel to that of states.¹¹³ Most authorities, such as the International Law Commission (ILC), however, maintain that only states may contribute to the formation of customary international law.¹¹⁴ Thus, while the ICRC documents the practice of armed groups, it distinguishes it from the practice of states with respect to establishing customary international law because of the uncertainty in

110. See *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 102–07 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Luisa Vierucci, 'Special Agreements' Between Conflicting Parties in the Case-Law of the ICTY, in *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 401 (Bert Swart, Alexander Zahar, & Göran Sluiter eds., 2011).

111. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

112. See *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. Rep. 3, 155 (Feb. 14) (dissenting opinion by Van den Wyngaert, J.); *Legal Consequences for Continued Presence of South Africa in Namibia, 1971 I.C.J. at 69–70, 74* (dissenting opinion by Ammoun, J.).

113. See generally Sophie Rondeau, *Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts*, 93 INT'L REV. RED CROSS 649 (2011).

114. See, e.g., Michael Wood (Special Rapporteur), *Second Rep. on Identification of Customary Int'l Law*, Draft Conclusion 5, U.N. Doc. A/CN.4/672 (May 22, 2014) as amended by Michael Wood (Special Rapporteur), *Third Rep. on Identification of Customary Int'l Law*, Draft Conclusion 4, U.N. Doc. A/CN.4/682 (Mar. 27, 2015); AREND, *supra* note 62; Jean d'Aspermont, *Conclusion: Inclusive Law-making and Law-enforcement Processes for an Exclusive International Legal System*, in *PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW* 425, 430 (Jean d'Aspermont ed., 2013).

qualifying actors in the rules needed to form customary international law.¹¹⁵ In any event, the precise normative effect of insurgent practice is not settled, but it is informative of the applicability of international humanitarian law.¹¹⁶

Underlying this practice is simply the *functional* need to ensure the protection of civilian populations by holding combatants to certain minimum legal obligations. Belligerents need to be covered by international humanitarian law in order to minimize the suffering of civilians and participants,¹¹⁷ but we do not want the combatants to enjoy the benefits of statehood or claim ignorance of *jus cogens* violations.¹¹⁸ Common Article 3 of the Geneva Conventions commands that the application of the Article “shall not affect the legal status of the Parties to the conflict.”¹¹⁹ What we find in this practice is that, occasionally, non-state actors are treated as if they have international legal personality depending on whether they are engaging with issues of international humanitarian law, thus creating a relativist, functional personality. This is the logical result of the theory of the “equality of belligerents”¹²⁰—that, for purposes of effective and practical application of a uniform code of the law of armed conflict, insurgents should be treated equally to the states they are fighting against.

Highlighting their relative nature, however, it is more debatable when analyzing whether prohibitions on the use of force, specifically Article 2, Section 4 of the U.N. Charter, apply to armed

115. See JEAN MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxvi, 64, 77, 115, 126, 356, 412, 778, 870, 2882, 3610 (2009); Jean Marie Henckaerts, *Binding Armed Opposition Groups Through Humanitarian Treaty Law and Customary Law*, COLLEGIUM, no. 27, 2003, at 123, <https://www.coleurope.eu/content/publications/pdf/Collegium27.pdf>.

116. See Richard R. Baxter, *The First Modern Codification of the Law of War*, 3 INT'L REV. RED CROSS 171 (1963).

117. See SHAW, *supra* note 42, at 265–341.

118. This, however, does not mean that DFRs have no international rights or obligations: “[I]nternational law has (...) developed some rudimentary mechanisms to ensure that the developments on the ground are not entirely left to the (domestic) ‘laws’ of anarchy.” Jonte van Essen, *De Facto Regimes in International Law*, 28 MERKOURIOS-UTRECHT J. INT'L & EUR. L., no. 75, 2012, at 31, 34 (citing SHAW, *supra* note 2, at 55).

119. See JEAN DE PREUX ET AL., COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 43–44 (1960).

120. See Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 INT'L REV. RED CROSS 655, 687 (2007).

groups.¹²¹ Some authorities now argue that, where insurgents have sufficient independent control and organize themselves into a *de facto* regime, they are state-like and may benefit from the prohibition on the use of force against states.¹²² Strictly speaking, the rule only covers “states,” and states can normally exercise their police function to resist civil war.¹²³ Yet, it may be argued that the term “state” is not the same as “U.N. member;”¹²⁴ thus, any insurgent group that operates a *de facto* state may qualify.¹²⁵ The Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG), an inquiry body established by the Council of the European Union to investigate the conflict in Georgia, found that the South Ossetia and Abkhazia entities, while not states, were “state-like” and thus covered by the prohibition on the use of force.¹²⁶ Similarly, the Office of the Prosecutor of the International Criminal Court has concluded that such state-like entities are capable of coordinated

121. See *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); SHAW, *supra* note 42, at 1123. For the possible prohibitions on the use of force by a state against a non-state actor, see *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ¶ 112; INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA REPORT 39–43 (2009) [hereinafter IIFFMCG REPORT ON THE CONFLICT IN GEORGIA], http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf.

122. See OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 160 (2010); CASSESE, *supra* note 50, at 157.

123. See IIFFMCG REPORT ON THE CONFLICT IN GEORGIA, *supra* note 121, at 239–42.

124. For example, the Ukrainian and Belorussian Soviet Socialist Republics were not states when they were admitted to the United Nations. See CRAWFORD, *supra* note 24, at 45, n.37. On the other hand, Switzerland has always been considered a state even when it was not a U.N. Member State. See *id.* at 193.

125. See generally Anthony Cullen & Steven Wheatley, *The Human Rights of Individuals in De Facto Regimes Under the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 691 (2013); Stefan Talmon, *The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?*, 75 BRIT. Y.B. INT’L L. 101, 104 (2004).

126. See IIFFMCG REPORT ON THE CONFLICT IN GEORGIA, *supra* note 121, at 239–42.

policy sufficient for crimes against humanity.¹²⁷ These cases, however, are not isolated. For example, James Crawford has applied the prohibition on the use of force to the relations between the People's Republic of China and the Republic of China on Taiwan,¹²⁸ and the U.N. Security Council has held that use of force between North and South Korea—which were not considered independent states at the time—was also covered by the prohibition on the use of force.¹²⁹ Again, a functional, pragmatic approach is taken because what matters is whether the entity controls territory comparable to a state.¹³⁰ The international legal personality of these entities, however, is understood to be relative to their nature, role, functions, and duties.¹³¹

D. Private Organizations: Corporations and Non-Governmental Organizations

Other organizations are increasingly considered international persons for limited, functional purposes. These entities can formally be private entities, such as corporations or universities, and can be incorporated in several different ways, including by states, individuals, and domestic law, but can also be created by treaty.¹³² As will be discussed below, there does not appear to be any barrier to granting personality rights to nontraditional bearers of personality where the international community deems it appropriate.¹³³

127. See generally Situation in Georgia, ICC-01/15, Request for Authorisation of an Investigation Pursuant to Article 15 (Nov. 17, 2015), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/15-4-Corr2>.

128. See CRAWFORD, *supra* note 24, at 191.

129. See *id.* at 470; S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950); S.C. Res. 84 (July 7, 1950); Tom Miles, *North Korea Threatens South with "Final Destruction,"* REUTERS (Feb 19, 2013), <http://www.reuters.com/article/2013/02/19/us-nkorea-threat-idUSBRE91I0J520130219> (reporting on the threat of a "final destruction" by North Korea against South Korea at the U.N. Conference on Disarmament in 2013 and the reactions of the governments of South Korea, France, Germany, Spain, Poland, the United States, and Britain that the threat was a breach of Article 2(4) of the U.N. Charter).

130. See THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 39 (1987); PEGG, *supra* note 81.

131. See Rondeau, *supra* note 113.

132. See, e.g., Agreement Concerning the Headquarters of the University for Peace, Mar. 29, 1982, 1288 U.N.T.S. 3.

133. See NIJMAN, *supra* note 1, at 3 (defining international legal personality and providing an extensive theoretical overview of this concept).

States can create private organizations through either treaty or domestic law. For example, the creation of the University for Peace was based on U.N. General Assembly Resolutions¹³⁴ (and remains intimately linked to, though not a part of, the United Nations¹³⁵) and a subsequent treaty.¹³⁶ Afterward, the university entered into a headquarters agreement with Costa Rica¹³⁷ that recognized it as an “international institution”¹³⁸ with “the legal status necessary to enable it to fulfil its purposes and objectives.”¹³⁹ Its headquarters are deemed inviolable,¹⁴⁰ and the institution and staff enjoy certain immunities akin to those of the United Nations.¹⁴¹ Despite its appearance and functions, this entity is not an NGO under domestic law but instead is an international organization.

States create corporations under domestic law, and they are more clearly understood as normal domestic entities;¹⁴² however,

134. See G.A. Res. 34/111 (Dec. 14, 1979); G.A. Res. 35/55 (Dec. 5, 1980).

135. See *Use of the United Nations Flag—United Nations Flag Code and Regulations Implementing the Code—United Nations Sponsorship of Events Organized by Groups or Individuals Not Officially Connected with the Organization*, 1983 U.N. JURID. Y.B. 163, 212, U.N. Doc. ST/LEG/SER.C/21; *Rules Governing the Use and Display of Distinctive Emblems by United Nations Organs—Practice of the United Nations Children’s Fund (UNICEF) in this Regard*, 1981 U.N. JURID. Y.B. 142, 154–55, U.N. Doc. ST/LEG/SER.C/19.

136. See International Agreement for the Establishment of the University for Peace and with the Charter of the University for Peace, Mar. 29, 1982, 1223 U.N.T.S. 87.

137. See Agreement Concerning the Headquarters of the University for Peace, *supra* note 132; see also Agreement Between the Government of the Republic of Colombia and the University for Peace for the Establishment of a World Research and Training Centre for Conflict Settlement, July 30, 1986, 2272 U.N.T.S. 159 [hereinafter Agreement for the Establishment of a World Research Centre] (describing the process of entering into agreements with states other than the host state).

138. See Agreement Concerning the Headquarters of the University for Peace, *supra* note 132, pmbl., arts. 2, 5, 6, 8.

139. See *id.* art. 2.

140. See *id.* art. 5.

141. See *id.* art. 8.

142. Although some authorities have even viewed these entities as having “limited international legal personality.” See, e.g., James A.R. Nafziger, *The Future of International Law in its Administrative Mode*, 40 DENV. J. INT’L L. & POL’Y 64 (2011–2012). For example, “[t]hese organizations included public international utility corporations with limited international legal personality, such as the Scandinavian Airlines System (“SAS”), the Basel-Mulhouse Airport, the Franco-Ethiopian Railway Company, the International Moselle Company, and the Central African Power Corporation.” *Id.* at 66.

this is not always the case. Where a treaty forms the basis for the agreement to incorporate under domestic law, the corporation might function as an international organization. Both the Bank for International Settlements (BIS)¹⁴³ and Eurofirma¹⁴⁴ technically are regarded as domestic corporations created by treaties but incorporated under domestic law and are considered *de facto* international legal persons. The BIS was initially established to facilitate German reparations under the Versailles Treaty and unusually included private corporations as parties to the treaty alongside states. Despite the participation of private corporations, who are mere domestic legal persons, as parties to BIS Convention, that participation does not appear to have changed the convention's status as a treaty. Although, perhaps we can wonder whether JP Morgan Bank is now a quasi-international person.

Similarly, states sometimes create NGOs by treaty yet incorporate under domestic law, and those entities can function as international persons. In order to discharge the international relations between the United States and Taiwan without endangering the one-China policy, the United States and Taiwan mutually incorporated NGOs within each other's domestic legal systems.¹⁴⁵ These NGOs are staffed by diplomats and empowered

143. See Convention Respecting the Bank for International Settlements, Jan. 20, 1930, 104 L.N.T.S. 441; Constituent Charter of the Bank for International Settlements, Jan. 20, 1930, 104 L.N.T.S. 445; Horst Reineccius (Claim No. 1) et al. v. Bank for Int'l Settlements, 23 R.I.A.A. 183, ¶ 108 (Perm. Ct. Arb. 2002).

144. See BROWNLIE, *supra* note 3, at 66–67 (discussing Eurofirma, the European Company for the Financing of Railroad Rolling Stock).

145. See Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14 (1979); Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and Cultural Representative Office in the United States, Feb. 4, 2013, <http://photos.state.gov/libraries/ait-taiwan/171414/ait-tecro-2013/20130204—agmt-on-privileges-exemptions-immunities-english.pdf> (replacing the 1980 Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and Cultural Representative Office in the United States). The “Taipei Economic and Cultural Representative Office in the United States,” which is the *de facto* embassy of the Republic of China, receives privileges and immunities, a grant not enjoyed by any other NGO in the United States. Moreover, the grant is authorized not by the U.S. government but by another NGO, the “American Institute in Taiwan,” which is the *de facto* embassy of the United States in Taipei.

to issue visas among other acts.¹⁴⁶ This situation is unusual, though not completely unique,¹⁴⁷ but there are examples of NGOs that are not mere diplomatic fig leaves acting as international persons. Like the BIS, the participation of a noninternational person in the formation of the NGO does not necessarily result in either defeating the international personality of the new entity or raising the noninternational person to the international plane. For example, the Global Alliance for Vaccines and Immunization (GAVI)¹⁴⁸ and the Global Fund to Fight AIDS, Tuberculosis and Malaria (“Global Fund”)¹⁴⁹ appear to be well positioned to enjoy enhanced personality in the near future. Similar to the treatment of the Global Fund,¹⁵⁰ GAVI is already considered an international legal person by Switzerland, though only for purposes of its headquarters agreement.¹⁵¹ Yet, GAVI

146. See, e.g., Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14 (1979); Exec. Order. No. 13014, Maintaining Unofficial Relations with the People on Taiwan, 61 Fed. Reg. 42,963 (Aug. 15, 1996).

147. Another example would be the ASEAN+3 Macroeconomic Research Office (AMRO), which was incorporated under Singaporean law to discharge “sovereign” macroeconomic and monetary analysis duties conferred on it by the Association of Southeast Asian Nations. See Chien-Huei Wu, *Monetary Cooperation in the East Asian Context: Progress and Challenges*, 8 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 583 (2013).

148. For more information, see Davinia Aziz’s excellent article on the pressure to extend privileges and immunities to GAVI and other similar organizations on functional grounds. See Davinia Abdul Aziz, *Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria*, 6 INT’L ORG. L. REV. 383 (2009); see also Gian Luca Burci, *Public/Private Partnerships in the Public Health Sector*, 6 INT’L ORG. L. REV. 359, 380 (2009).

149. See G.A. Res. 64/122, at 586 (Dec. 16, 2009) (granting the Global Fund observer status). For more detailed reasoning on how it qualifies as such, see U.N. GAOR, 64th Sess., U.N. Doc. A/64/144 (July 14, 2009).

150. See Agreement Between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in View of Determining the Legal Status of the Global Fund in Switzerland, June 23, 2009, Global Fund Doc. GF/B8/7 [hereinafter Agreement Between Switzerland and the Global Fund to Fight AIDS].

151. See *id.* Not only is GAVI functionally an international legal person in the view of Swiss law, it is, relatively, an international legal person in that the United States does not regard it as an international legal person at all. This situation results in the odd arrangement where GAVI staff in Switzerland enjoy immunities but those seconded to the office in Washington, D.C. do not. For its part, GAVI appears to consider itself an international organization. *About Gavi, The Vaccine Alliance*, GAVI, <http://www.gavi.org/about/> (last visited Sept. 14, 2016) (“Created in 2000, Gavi is an international organisation - a global

might be better understood as a public-private partnership, as it brings together various actors, such as the U.N. Children's Fund ("UNICEF"), International Bank for Reconstruction and Development ("World Bank"), World Health Organization (WHO), and the Bill & Melinda Gates Foundation.¹⁵² Of course, there is no serious debate over whether the Bill & Melinda Gates Foundation is an international person, as it has never sought the kind of role and engagement typical of that status.

The situation changes, however, when the private entity is incorporated purely by individuals without state participation—though there are exceptions here as well. Normally, domestic NGOs and corporations are not considered international persons. Previously, in the *Anglo-Iranian Oil Company* case, the ICJ did not recognize an agreement between a corporation and a state as a treaty.¹⁵³ The question before the ICJ in that case was not whether the agreement was legally binding between international persons but rather if the ICJ would have jurisdiction over an agreement between a private company and the state of Iran.¹⁵⁴ Since a corporation cannot be a party to the ICJ Statute, the case was easily dismissed, but the dismissal of the case cannot necessarily be understood as a refusal to consider the Anglo-Iranian Oil Company as an international legal person. There may be other reasons why it is not, but the result in this case does not definitively answer that particular question.

The U.N. Office of Legal Affairs has been cautious about the subject of new non-state international legal persons, although it did opine that autonomous public entities that are not themselves international legal persons might be able to constitute an international legal person.¹⁵⁵ Despite this position, it is increasingly being argued that a corporation can be held responsible for international crimes under international law. Usually, individuals, not corporations, are held responsible under international

Vaccine Alliance, bringing together public and private sectors with the shared goal.”). It may be, however, that this text was not vetted by GAVI counsel.

152. See *Board Composition*, GAVI, <http://www.gavi.org/about/governance/gavi-board/composition/> (last visited Mar. 22, 2017); GAVI ALLIANCE BY-LAWS (June 18–19, 2014), <http://www.gavi.org/library/gavi-documents/legal/gavi-alliance-by-laws/>.

153. See *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgment, 1952 I.C.J. Rep. 93, 112 (July 22).

154. See *id.* at 103.

155. See *Study Prepared for the Economic Commission for Asia and the Far East*, 1971 U.N. JURID. Y.B. 215–18, U.N. Doc. ST/LEG/SER.C/9.

criminal law.¹⁵⁶ Certainly, entities like Greenpeace are legal persons in their respective domestic legal orders, and perhaps even enjoy certain rights aimed at natural persons;¹⁵⁷ but, thus far, they do not appear to be treated as international legal persons. This position, however, appears to be on the cusp of potentially shifting. One of the more important recent developments in this regard was the Special Tribunal for Lebanon (STL) decision with respect to contempt against a corporation.¹⁵⁸ The STL Prosecutor charged not only Karma Al Khayat, an individual, but also New TV SAL (Al Jadeed TV), a corporation, with contempt of the STL. In interpreting the term “person” in STL Rule 60 *bis*, the STL found that the term could include either natural or legal persons.¹⁵⁹ The tribunal noted the changing nature of corporations in the international area in support of its decision,¹⁶⁰ and thus analyzed the situation from a functional perspective.¹⁶¹

Shifting from corporations to NGOs, certain NGOs created by private individuals also enjoy a degree of relative personality, depending on the way other international legal actors interact

156. See *United States v. Krauch et al.* (“I.G. Farben case”), Judgment, *in* 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS [T.W.C.] 1081, 1132 (1948); *United States v. Krupp et al.*, Judgment, *in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS [T.W.C.] 1327, 1447 (1948).

157. See, *e.g.*, Case T-545/11, *Stichting Greenpeace Nederland & Pesticide Action Network Eur. v. Comm’n*, CURIA ¶ 27 (Oct. 8, 2013), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d597a59da204e14e839c99f0fd200512a4.e34Kax-iLc3qMb40Rch0SaxyKch10?text=&docid=142701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1055864> (holding implicitly that, because the Treaty on European Union intended for “an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen,” Greenpeace could bring a claim for access to documents under EU Regulations (EC) 1049/2001 and 1367/2006, and Directive 91/313/EEC).

158. See *New T.V. S.A.L. & Karma Mohamed Tashin Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 60 (Oct. 2, 2014) [hereinafter *New T.V. S.A.L.*, Decision on Interlocutory Appeal]; see also *Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) & Karma Mohamed Tashin Al Khayat*, Case No. STL-14-05/A/AP, Judgment (Appeals Panel, Mar. 8, 2016) [hereinafter *Al Jadeed [Co.]*, Appeals Panel Decision]; *Akhbar Beirut S.A.L. & Ibrahim Mohamed Ali Al Amin*, Case No. STL-14-06/T/CJ, Judgment (July 15, 2016).

159. See *New T.V. S.A.L.*, Decision on Interlocutory Appeal, ¶¶ 42–44.

160. See *id.* ¶ 82.

161. See *id.* ¶ 83.

with the entity.¹⁶² The most prominent of these bodies is the ICRC.¹⁶³ Both Switzerland, which concluded a headquarters agreement with the ICRC and acknowledged its international legal personality (at least as it concerns the Swiss legal order),¹⁶⁴ and the ICTY recognize the ICRC's personality.¹⁶⁵ In the *Simić* case before the ICTY, the tribunal addressed the issue of whether an employee of the ICRC could be compelled to testify to facts acquired in the course of service to the organization.¹⁶⁶ The tribunal concluded that the individuals did not create the ICRC, rather, they vested the organization with important international duties by treaty with widespread adherence.¹⁶⁷ This suggests that the Chamber might have considered the Geneva Conventions as somehow constitutive of the ICRC's international legal personality.¹⁶⁸ The Chamber later observed, how-

162. See, e.g., Agreement for the Establishment of a World Research Centre, *supra* note 137.

163. See GEORGES WILLEMIN & ROGER HEACOCK, 2 THE INTERNATIONAL COMMITTEE OF THE RED CROSS: INTERNATIONAL ORGANIZATION AND THE EVOLUTION OF WORLD SOCIETY 199–202 (1984).

164. Compare Int'l Comm. of the Red Cross, *Statutes of the International Committee of the Red Cross*, ICRC art. 2 (Oct. 3, 2013) <https://www.icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm>, with Conclusion of a Headquarters Agreement Between the International Committee of the Red Cross and the Swiss Confederation, Mar. 19, 1993, reprinted in 293 INT'L REV. RED CROSS 152 (1993) and Agreement to Determine the Legal Status of the ICRC in Switzerland, *supra* note 25 and Protocol Amending the Agreement on the Relations Between the International Commission for the International Tracing Service and the International Committee of the Red Cross, May 16, 2006, T.S. No. 20 (including participation of Belgium, France, Germany, Israel, Italy, Luxembourg, Netherlands, United Kingdom of Great Britain and Northern Ireland, United States, and the ICRC).

165. See Prosecutor v. Simić et al. ("Bosanski Šamac"), Case No. IT-95, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness (Int'l Crim. Trib. for the Former Yugoslavia July 27, 1999), <http://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm>.

166. *Id.*

167. See *id.*; see also Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 9, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention [II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 9, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War art. 9, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, *supra* note 82.

168. See Prosecutor v. Simić et al. ("Bosanski Šamac"), Case No. IT-95.

ever, that “the ICRC possesses international personality because states have tacitly recognized it as an international person,”¹⁶⁹ which reaffirms the understanding that personality for that entity is relative and subjective.

But, the ICRC is not alone. Other entities incorporated under domestic law might also have international legal personality. For example, the International Air Transport Association (IATA)¹⁷⁰ and the World Anti-Doping Agency (WADA)¹⁷¹ are considered to have some degree of international personality comparable to international organizations based on their functions. The IATA is an association of various global airlines.¹⁷² WADA is a foundation responsible for the World Anti-Doping Code, which harmonizes anti-doping standards across sports.¹⁷³ The

169. See PORTMANN, *supra* note 1, at 112 n.130 (citing Christian Dominicé, *La Personnalité Juridique Internationale du CICR*, in *ÉTUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET* 663, 672 (C. Swinarski ed., 1984)); CRAWFORD, *supra* note 24, at 43–44.

170. See Int'l Air Transp. Ass'n [IATA], *IATA's Corporate Governance Structure*, IATA.ORG, <http://www.iata.org/about/Pages/corporate-structure.aspx> (last visited Feb. 19, 2017); Accord du 20 décembre 1976 entre le Conseil fédéral suisse et l'Association du Transport aérien international (IATA) pour régler le statut fiscal des services et du personnel de cette organisation en Suisse, Dec. 20, 1976, <http://www.admin.ch/ch/f/rs/i1/0.192.122.748.fr.pdf> (French); Agreement Between the Kingdom of Spain and the International Air Transport Association (IATA) on the Status of the IATA in Spain pmbl. ¶ 4, May 5, 2009, 2643 U.N.T.S. 91 (“Bearing in mind: . . . That the Kingdom of Spain recognises and stresses the importance of IATA as an international organisation that promotes air transport.”); Jenni et al. v. Conseil d'État of the Canton of Geneva (Switz.), *reprinted in* 75 INT'L L. REP. 99 (“It was therefore without being guilty of an arbitrary decision that the Council of State considered that IATA was a public international organization within the meaning of Article 7 [of the General Law on Public Taxes of 9 November 1887].”).

171. See WORLD ANTI-DOPING AGENCY [WADA], CONSTITUTIVE INSTRUMENT OF FOUNDATION OF THE AGENCE MONDIALE ANTIDOPAGE/WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/Documents/About_WADA/Statutes/WADA_Statutes_2009_EN.pdf; Accord du 5 mars 2001 entre le Conseil fédéral suisse et l'Agence mondiale antidopage pour régler le statut fiscal de l'Agence et de son personnel en Suisse, Mar. 5, 2001, http://www.admin.ch/ch/f/rs/c0_192_120_240.html (French); *Study Prepared for the Economic Commission for Asia and the Far East*, *supra* note 155.

172. See Int'l Air Transp. Ass'n [IATA], *About Us*, IATA, <http://www.iata.org/about/pages/index.aspx> (last visited Mar. 22, 2017).

173. See World Anti-Doping Agency [WADA], *Who We Are*, WADA, <https://www.wada-ama.org/en/who-we-are> (last visited Mar. 22, 2017).

International Olympic Committee also enjoys special status in that it operates universally, has drafted the leading standards for global sports organizations, and has a role in both the WADA and the Court of Arbitration for Sport¹⁷⁴—although whether it enjoys truly international rights and duties is still unclear.

Other private entities are potential candidates to begin receiving treatment as international legal persons in the near future. The Internet Corporation for Assigned Names and Numbers (ICANN) and the Basel Institute on Governance's International Centre for Asset Recovery (ICAR) discharge quasi-governmental roles independently from governments and have an international impact, which may eventually transition them into international legal persons based on their roles.¹⁷⁵ More peculiar examples might include the International Organization for Standardization (ISO), which is a private organization founded by individuals.¹⁷⁶ It is largely considered a successor organization to the International Standards Association and the United Nations

174. See David J. Ettinger, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. 97, 104 (1992) (mentioning that the International Olympic Committee has international personality); see also Nairobi Treaty on the Protection of the Olympic Symbol, Sept. 26, 1981, 1863 U.N.T.S. 367.

175. For more information on ICANN, see *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, ICANN (Oct. 3, 2016), <http://www.icann.org/resources/pages/governance/articles-en>; INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS, DRAFT IMPLEMENTATION PLAN FOR IMPROVING INSTITUTIONAL CONFIDENCE 12, 30 (2009), <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>; *Educational Material to Assist ICANN in Deciding What Status the Corporation Should Aim for as a Private International Entity in Its Host Country*, ICANN, paras. 5, 49–58, <http://www.icann.org/en/psc/corell-24aug06.html> (last visited Feb. 19, 2017) (citing the Global Fund Headquarters Agreement as a possible precedent for ICANN's own review of its legal status). No final version of the Draft Implementation Plan was available as of the date of this publication. But, for one structural account of why regulation by a single entity is not appropriate for the internet, see generally Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L L. 799 (2008). For the Basel Institute's ICAR, see generally *ICAR Mandated to Assist Ukraine in Recovering Yanukovych Assets*, BASEL INST. ON GOVERNANCE (Aug. 12, 2014), https://www.baselgovernance.org/sites/collective.localhost/files/documents/press_release_2014-08-11.pdf (reporting on the agreement between ICAR and Ukraine to help the state recover assets stolen by the former Ukraine President Yanukovych).

176. See Int'l Org. for Standardization, *About ISO*, ISO, <https://www.iso.org/about-us.html> (last visited Mar. 22, 2017).

Standards Coordinating Committee¹⁷⁷ and has a prominent role in establishing standards that can be adopted in legally binding instruments, such as the WTO Agreements.¹⁷⁸ ISO membership includes various scientific associations, many of which are government bodies.¹⁷⁹ At some point, its significance may justify special treatment as an international legal person, at least for certain purposes, such as immunities for the organization or the ability to enter into treaties. But, for now, these actions are not possible. Similarly, the European Broadcasting Union, which produces the Euronews channel and the Eurovision song contest,¹⁸⁰ might be another entity with personality poised for transition. On the one hand, it is clearly an association incorporated under Swiss law¹⁸¹ that does not assert state immunity or similar treatment,¹⁸² yet, on the other hand, it receives considerable financial support from the European Union¹⁸³ and benefits from unusual privileges due to its important role in European cooperation and integration.¹⁸⁴

177. See INT'L ORG. FOR STANDARDIZATION CENTRAL SECRETARIAT, *FRIENDSHIP AMONG EQUALS: RECOLLECTIONS FROM ISO'S FIRST FIFTY YEARS* 15–18 (1997).

178. See Agreement on Technical Barriers to Trade annex 1, ¶ 2, Apr. 15, 1994, 1868 U.N.T.S. 120.

179. See *ISO Members*, ISO, http://www.iso.org/iso/home/about/iso_members.htm (last visited Feb. 20, 2017).

180. See *About Us*, EUR. BROADCASTING UNION, <https://www.ebu.ch/about> (last visited Feb. 20, 2017); *The Story*, EUROVISION SONG CONTEST, <http://www.eurovision.tv/page/history/the-story> (last visited Mar. 22, 2017); *About Euronews*, EURONEWS, <http://www.euronews.com/about> (last visited Mar. 22, 2017).

181. EUR. BROADCASTING UNION, *STATUTES OF THE EUROPEAN BROADCASTING UNION* art. 1.1 (Dec. 2015), http://www3.ebu.ch/files/live/sites/ebu/files/About/Governance/Statutes%202013_EN.pdf.

182. See Case C-98/92 P, *Eur. Broadcasting Union v. La Cinq SA*, Order, E.C.R. (1992), *reprinted in* 1992 O.J. C (310) 3 (ruling that a decision was unnecessary).

183. See Written Question No. 1664/91 by Mr. Georgios Romeos (S) to the Commission of the European Communities, 1992 O.J. (C 66) 26, 27 (discussing official financial support from the EU to Euronews).

184. See Case C-470/02 P, *Union européenne de radio-télévision (UER) v. Comm'n of the Eur. Comms.*, E.C.R., *reprinted in* 2003 O.J. (C 55), 13–14 (documenting, for example, the role of the European Union in the management and activities of the European Broadcasting Union with respect to the Eurovision song contest); European Commission Press Release IP/00/472, *Commission Approves the EBU-Eurovision System* (May 12, 2000) (reporting that the European Commission exempted the European Broadcasting Union from normal

Other entities participate, sometimes very intimately, with other international persons; however, it is difficult to consider them international persons, despite functional analysis suggesting otherwise. For example, the Carnegie Foundation is considered to be a "private foundation" in private diplomatic correspondence.¹⁸⁵ Nonetheless, it entered into an agreement with the United Nations for the ICJ to use the premises of the Peace Palace in The Hague, and this agreement was registered with the U.N. Secretary-General and published in the U.N. Treaty Series.¹⁸⁶ Accordingly, notwithstanding the ICJ's holding in *Anglo-Iranian Oil*, occasionally, agreements are made between international persons and private corporations and are deposited (either mistakenly or due to the unavailability of a more appropriate vehicle) with the U.N. Secretary-General as if they were treaties.¹⁸⁷ The U.N.-Carnegie Foundation agreement notes, however, that it is "expressly understood that the question of the establishment of the [ICJ] at the Peace Palace exclusively concerns the [United Nations] and the Carnegie Foundation, and is consequently outside the jurisdiction of any other organization. . . ."¹⁸⁸ The reasons behind the unexpected use of the expression "jurisdiction" along with the term "organization" is not entirely clear. Normally, "jurisdiction" is reserved for the lawful authority of states, not organizations. Perhaps, this phrase is intended to exclude the Permanent Court of Arbitration, Peace Palace Library, and Hague Academy of International Law from exercising their "jurisdiction" by interfering with the establishment of the ICJ. In any event, it appears that this agreement is not a mere rental contract under Dutch law. If that is the case, then the foundation has some power to conclude agreements outside of

antitrust law regarding Eurovision because, *inter alia*, "the Eurovision System facilitates cross-border broadcasting and contributes to the development of a single European broadcasting market.").

185. See U.S. Dep't of State, *First Forum of the UN Alliance of Civilizations*, Cable No. 08MADRID52_a, WIKILEAKS paras. 1, 4 (Jan. 18, 2008), https://wikileaks.org/plusd/cables/08MADRID52_a.html# [hereinafter *Cable No. 08MADRID52_a*] (reporting on the "First Forum of the Alliance of Civilizations," which was attended by the Carnegie Foundation as a "private foundation").

186. See G.A. Res. 84 (I), annex A (Dec. 11, 1946).

187. See, e.g., Project Agreement—Technical Specification and Market Study of Potentially Important Jute Geotextile Products, *adopted* July 26, 1991, 1792 U.N.T.S. 452.

188. See G.A. Res. 84(I), *supra* note 186, annex A, art. XV.

normal domestic law agreements and, perhaps on that basis, is not an ordinary Dutch *Stichting* (foundation). Notwithstanding this unusual “international” agreement and the public function that the foundation serves, it seems uncomfortable to view the foundation as an international person, even though the parallels with the ICRC are difficult to avoid.

In addition, some authorities assert that transnational corporations and NGOs already enjoy a degree of international personality beyond the isolated and peculiar examples cited above.¹⁸⁹ Of course, corporations are increasingly being seen as potentially responsible for international crimes,¹⁹⁰ and they are leaders in setting international standards,¹⁹¹ similar in some ways to the work of the ISO. Additionally, international litigation between states and international corporations is becoming commonplace,¹⁹² and some treaties,¹⁹³ and possibly even general

189. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1932, 213 U.N.T.S. 262; North American Free Trade Agreement, Can.-Mex.-U.S., ch. 11, Dec. 17, 1992, 32 I.L.M. 289; MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* 5 (2012); PORTMANN, *supra* note 1, at 42–79; Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229 (2015) (arguing that private corporations are increasingly able to create new rules of international law); CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 I.L.M. 1205 (2005); see also José Alvarez, *Are Corporations “Subjects” of International Law?*, 9 SANTA CLARA J. INT’L L. 1, 5–6 (2011); Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretence of Exclusion*, 51 VA. J. INT’L L. 977 (2011).

190. See generally Joanna Kyriakakis, *Developments in International Criminal Law and the Case of Business Involvement in International Crimes*, 94 INT’L REV. RED CROSS 981 (2012).

191. See Vaughan Lowe, *Corporations as International Law Actors and Law-Makers*, 14 ITALIAN Y.B. INT’L L. 23, 23–26 (2004).

192. See, e.g., Award on the Merits in Texaco Overseas Petroleum Company, *supra* note 9; Christoph Schreuer, *Access to ICSID Dispute Settlement for Locally Incorporated Companies*, in INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 497 (Friedl Weiss, Erik Denters, & Paul de Waart eds., 1998); T.W. Wälde, *Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation*, 12 ARB. INT’L 429, 429–67 (1996).

193. See G.A. Res. 58/4, annex, U.N. Convention Against Corruption art. 23 (Oct. 31, 2003); Criminal Law Convention on Corruption art. 18, Jan. 27, 1999, E.T.S. No. 173; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions arts. 2–3, Dec. 17, 1997, S. TREATY DOC. No. 105-43; Inter-American Convention Against Corruption art. VIII, Mar. 29, 1996, S. TREATY DOC. 105-39; U.N. Convention on the Law of the Sea

international law, directly impose rights and duties on corporations.¹⁹⁴ Even for those NGOs that do not enjoy these kinds of special statuses, many NGOs have been admitted to the U.N. Economic and Social Council (ECOSOC) as observers.¹⁹⁵ None of these activities, however, constitute participation in the international sphere in the classic sense. Some authorities even suggest that NGOs and corporations should now have a role in contributing to customary international law¹⁹⁶ and otherwise forming new international norms.¹⁹⁷ These developments have led some to conclude that corporations now enjoy limited international legal personality linked to their functions,¹⁹⁸ especially in the investment dispute context, where the personality is relative and limited to the parties to the dispute, not *erga omnes*.

arts. 137(1)–(3), 187–88, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994); International Convention on Civil Liability for Oil Pollution Damage arts. I(3), III–VII, Nov. 29, 1969, 973 U.N.T.S. 3. *See generally* Award on the Merits in Texaco Overseas Petroleum Company, *supra* note 9.

194. *See* Malcolm Langford, *Cosmopolitan Competition: The Case of International Investment*, in COSMOPOLITAN JUSTICE AND ITS DISCONTENTS 179 (Cecilia M. Bailliet & Katja Franko Aas eds., 2011); Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the European Community*, in THE EU AND HUMAN RIGHTS 556–61 (Philip Alston et al. eds., 1999).

195. *See* U.N. Charter art. 71 (“The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”); Economic and Social Council Res. 1996/31 (July 25, 1996).

196. *See* Dem. Rep. Congo v. Belg., 2002 I.C.J. at 155 (dissenting opinion by Van den Wyngaert, J.) (citing “the opinion of civil society”); Roberts & Sivakumaran, *supra* note 109; Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 108 (1995) (examining the practice of states plus “international organizations, transnational corporations and other nongovernmental groups.”). Also, note that the original proposal to define custom in the statute of the Permanent Court of International Justice, which stated that “practice between nations [is] accepted by them [the nations] as law,” was rejected, suggesting that the practice might not be limited to states only.

197. *See* Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award (July 14, 2006), 14 ICSID Rep. 374; CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 I.L.M. 1205 (2005).

198. *See* SHAW, *supra* note 42, at 250 (“[T]he question of the international personality of transnational corporations remains an open one.”); CLAPHAM, *supra* note 27, at 515–16; BROWNLIE, *supra* note 3, at 525; David Kinley &

This possible development is not without precedent. Historically, many colonial companies under the East India Company model entered into agreements with indigenous peoples and European states that were not formal treaties under contemporary international law but were substantively comparable and may have been regarded at the time as true treaties under international law.¹⁹⁹ While not dispositive,²⁰⁰ many of these agreements were even titled “treaty.”²⁰¹ One reason we can infer that the parties regarded them as treaties under international law is that some of the topics covered in such agreements involved matters

Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 944–46 (2004); Alvarez, *supra* note 189, at 2.

199. For further information, see *infra* notes 201–04.

200. See VCLT, *supra* note 19, art. 2(1)(a) (“Treaty means . . . [the following definition] . . . whatever its particular designation.”).

201. See, e.g., Treaty Between the Danish West India Company and Brandenburg, Dec. 4, 1685, 17 Consol. T.S. 387; Asiento Between Spain and the Portuguese Guinea Company, July 12, 1696, 21 Consol. T.S. 151; Agreement Between the Netherlands West Indies Company and Hanau, July 24, 1669, 11 Consol. T.S. 173; Asiento for the Introduction of Negro Slaves into Spanish America Between the French Guinea Company and Spain, Aug. 27, 1701, 23 Consol. T.S. 489; Asiento Between Spain and the East India Company (Great Britain), Mar. 26, 1713, 27 Consol. T.S. 425; Convention Between the British East India Company and the Swedish East India Company, Oct. 6, 1740, 36 Consol. T.S. 95; Treaty Between the East India Companies of Great Britain and the Netherlands, Dec. 1, 1759, 41 Consol. T.S. 359; Treaty Between the East India Company (Great Britain) and the Imam of Senna (Yemen), Jan. 15, 1802, 71 Consol. T.S. 335. In an odd twist, these agreements were often adopted by the state of the corporation’s “nationalized” incorporation at a later date and discharged as public law or treaty obligations and not mere contractual obligations. If they were not initially treaty obligations, then the adoption would have had the effect of “treaty-izing” the obligations, a process heretofore unknown in international law. Therefore, they must have been treaty obligations *ab initio*.

normally covered by public law, such as raising a military,²⁰² establishing a protectorate,²⁰³ and cessation of territory.²⁰⁴ In addition, in the nineteenth century, the unique entity of the Hanseatic League operated on the international plane as a trade confederation with leadership vested in the cities of Hamburg, Lubeck, and sometimes Bremen.²⁰⁵ Some of these agreements also clearly dealt with matters of public law.²⁰⁶ These latter examples of state-corporation treaties of the type used by the East India Company are of course removed from contemporary international law but not so distantly as we might think, as the latest one was concluded as late as 1914.²⁰⁷ The strange situation involving international colonial companies in international law, while initially tempting to view in contemporary corporate

202. *See, e.g.*, Agreement Between Denmark and Brandenburg Regarding the Supply of Troops and the Composition of Differences at St. Thomas Between the Danish and Brandenburg West India Companies, Apr. 21, 1692, 19 Consol. T.S. 467.

203. *See, e.g.*, Agreement Between Great Britain and the British North Borneo Company for the Establishment of a Protectorate, May 12, 1888, 171 Consol. T.S. 53.

204. *See, e.g.*, Contract of Sale and Cession of the Island of St. Croix Between France and the Danish West India Co., June 15, 1733, 34 Consol. T.S. 47.

205. *See, e.g.*, Convention of Commerce Between Great Britain and the Hanseatic Republics of Lubeck, Bremen and Hamburg, Sept. 29, 1825, 75 Consol. T.S. 385; Convention of Friendship, Commerce and Navigation Between the Hanseatic Republics (Bremen, Hamburg and Lubeck) and the United States, Dec. 20, 1827, 77 Consol. T.S. 477; Additional Act for the Navigation of the Elbe Between Anhalt, Austria, Denmark, Hanover, the Hanse Towns of Hamburg and Lubeck, Mecklenburg-Schwerin, Prussia and Saxony, Apr. 13, 1844, 96 Consol. T.S. 307-1; Convention Between Anhalt, Austria, Denmark, Hanover, the Hanse Towns of Hamburg and Lubeck, Mecklenburg-Schwerin, Prussia and Saxony on the Publication of Uniform Police Ordinances for the Elbe, Apr. 13, 1844, 96 Consol. T.S. 307-3; Additional Commercial Convention Between the Hanse Towns of Bremen, Hamburg and Lubeck, and Sardinia, Sept. 20, 1860, 123 Consol. T.S. 49; Additional Treaty of Amity, Commerce and Navigation Between the Hanseatic Cities of Bremen, Hanover and Lubeck, and Turkey, Sept. 27, 1862, 126 Consol. T.S. 299.

206. *See, e.g.*, Consular Convention Between the Hanseatic Republics (Bremen, Hamburg and Lubeck) and the United States, Apr. 30, 1852, 108 Consol. T.S. 91; *see also* Convention Between France, Great Britain and the Hanse Towns (Bremen, Hamburg and Lubeck), for the Accession of the Latter to the Slave Trade Conventions, June 9, 1837, 87 Consol. T.S. 19 (providing for accession to a treaty of general application to subjects of international law).

207. *See* Agreement Between the British South Africa Co. (Great Britain) and Portugal Amending the Agreement of 28 August 1913 Relative to the Recruitment of Native Labourers for Rhodesia, July 4, 1914, 220 Consol. T.S. 152.

terms, is probably more accurately viewed as a hybrid state-corporate, quasi-national entity.²⁰⁸ In any event, this historical study may suggest that international legal personality, as the exclusive quality we see today, may have been far more fluid and liberal in the past.

E. Religious Organizations

Religious organizations also operate on the international plane to some degree, and some of these bodies clearly have international legal personality. While religious organizations do not appear to have a unique legal status in international law based on their missions,²⁰⁹ they are capable of bearing international legal personality and, at times, are accorded personality on a functional basis.

The most obvious and well accepted example of a religious organization that bears international legal personality is the Holy

208. See Koen Stapelbroek, *Chartered Companies, and Merchantile Associations*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 339 (Bardo Fassbender & Anne Peters eds., 2012).

209. See generally IOANA CISMAS, *RELIGIOUS ACTORS AND INTERNATIONAL LAW* (2014).

See.²¹⁰ The Holy See is not a state,²¹¹ although it is sometimes referred to as a state²¹² or otherwise treated as if it were a state, apparently without much consideration of its unusual nature. For example, the Holy See's practice is usually considered alongside the practice of states for the formation of customary international law.²¹³ It is often argued that the distinction between the Holy See and other actors in this article, similar to that of states, is rooted in the difference between original and derivative personality. Like states, the Holy See claims it has "original,

210. See, e.g., Agreement Between the Holy See and Prussia, July 16, 1821, 72 Consol. T.S. 81; Accord Between France and the Holy See, Fr.-Holy See, Apr. 16, 1832, 82 Consol. T.S. 381; Agreement Between Belgium and the Holy See Relative to Navigation etc., Belg.-Holy See, Apr. 7, 1840, 90 Consol. T.S. 83; Agreement Between the Holy See and Modena Respecting Ecclesiastical Property, June 23, 1857, 117 Consol. T.S. 75; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, *reprinted in* D. SCHINDLER AND J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 280–81 (Martinus Nihjoff ed., 1988) (no longer in force); Additional Postal Convention Between France and the Holy See, Fr.-Holy See, July 11, 1865, 130 Consol. T.S. 274; Additional Protocol to the Convention of 4 August 1898 Between Colombia and the Holy See, Colom.-Holy See, July 3, 1907, 204 Consol. T.S. 299; Treaty Between the Holy See and Italy ("Lateran Accords"), Holy See-It., Feb. 11, 1929, <http://www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/LateranTreaty.pdf>; Protocol on Road Signs and Signals, Sept. 19, 1949, 514 U.N.T.S. 254; Agreement Between the Holy See and the Argentine Republic, Arg.-Holy See, Oct. 10, 1966, 601 U.N.T.S. 187; Agreement Concerning Mutual Relations, Holy See-Sp., July 28, 1976, 1030 U.N.T.S. 357; Agreement Concerning Economic Matters, Holy See-Sp., Jan. 3, 1979, 1154 U.N.T.S. 39; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211; *Holy See v. Starbright Sales Enterprises Inc. (S.C., Dec. 1, 1994) (Phil.)*, *reprinted in* 102 INT'L L. REP. 163, 169.

211. See CRAWFORD, *supra* note 24, at 43–44. *But see* JORRI DUURSMA, *FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES* 374–419 (James Crawford et al. eds., 1996).

212. See, e.g., Arms Trade Treaty, First Conference of States Parties, Draft Final Rep., ¶ 15, ATT/CSP1/2015 (Aug. 27, 2015) ("The following twelve (12) States also attended the Conference as observers: Algeria, Botswana, China, Fiji, *the Holy See*, Jordan, Kenya, Papua New Guinea, Qatar, Saudi Arabia, Viet Nam and Yemen." (emphasis added)).

213. See, e.g., Alain Pellet (Special Rapporteur), *Third Rep. on Reservations to Treaties*, ¶ 6, U.N. Doc. A/CN.4/491 (Apr. 30, 1998) (considering the practice of the Holy See as *state practice* for purposes of the formation of customary international law).

nonderived legal personality.”²¹⁴ In an ICJ advisory opinion requested by the WHO on the legality of the use of nuclear weapons in armed conflict under international law, the court held that the crucial factor in determining original and derivative personality focuses on which entity can create another and “invest” it with powers.²¹⁵ The difficulty is that some authorities implicitly assert that only states are original persons.²¹⁶ In addition, the very notion of originality is relative; international organizations have capacity to create other international organizations and invest them with powers,²¹⁷ so, in that relative sense, an international organization could be said to be the original person and the new organization would therefore be derived from it. Nevertheless, the personality of the Holy See does not depend on an act of creation by another international legal person.

The Holy See, however, is not entirely unique. Other religious entities exist with partial and functional, international personality. The most well-known of these strange cases is probably the Sovereign Military Order of Malta (SMOM), otherwise known as the “Knights of Malta.”²¹⁸ But, the phenomenon of sovereign military orders historically included entities other than the SMOM.²¹⁹ Reaching the same conclusion as this article, other

214. See Comm. on the Rights of the Child, *List of Issues in Relation to the Second Periodic Report of the Holy See, Addendum: Replies of the Holy See to the List of Issues*, ¶ 6, U.N. Doc. CRC/C/VAT/Q/2/Add.1 (Jan. 9, 2014).

215. See Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. ¶ 25; Reparation for Injuries Suffered in Service of the United Nations, 1949 I.C.J. at 178–79.

216. See SHAW, *supra* note 42, at 247–48, 261 (“States are the original and major subjects of international law.”).

217. See Agreement for the Establishment of the Joint Vienna Institute, *supra* note 27 (evidencing an international organization created purely by other international organizations).

218. See, e.g., Agreement Between the Sovereign Order of Malta and Poland, Malta-Pol., Feb. 2, 1775, 45 Consol. T.S. 465; Convention Between Bavaria and the Sovereign Order of Malta, Jan. 28, 1806, 58 Consol. T.S. 381; Cass., Nanni v. Pace & the Sovereign Order of Malta, 13 marzo 1935 (It.), reprinted in 8 ANN. DIGEST 2 (1935–1937); CASSESE, *supra* note 50, at 132.

219. See, e.g., Convention Between the Teutonic Order and the States of the Former Confederation of the Rhine, Aug. 15, 1813, 62 Consol. T.S. 343; Convention Between the Teutonic Order and Wurtemberg, Aug. 15, 1813, 62 Consol. T.S. 351; see also Treaty Between Brandenburg and the Equestrian Order of Prussia, Nov. 12, 1655, 4 Consol. T.S. 21; Karol Karski, *The International*

authorities have described the personality of the SMOM as “functional.”²²⁰ In addition to the SMOM, we also have the curious Paréage of Andorra, which was adopted between the Count of Foix and the Bishop of Urgell in 1278 and established joint sovereignty over Andorra until 1993, when the entity adopted its modern constitution and became a modern state.²²¹ At that time, the contemporary heirs to the Paréage were the President of France and Bishop of Urgell, who were functioning as “Co-Princes.” The arrangement was sometimes termed a “condominium,” although it is unclear whether this term is correct when the governance is not by two states sharing sovereignty but rather two individuals acting as co-Heads of State.²²² In any event, apparently, as late as 1993, the international community accepted the possibility of a bishop having the functional capacity to personally dispose of the sovereignty of a state.

The Dalai Lama provides another example of a religious actor having international personality. This religious leader enjoys some aspects of international respect, although his personality is difficult to separate from the personality of Tibet and/or the Tibetan Government in Exile²²³ and perhaps overlaps with a

Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta, 14 INT'L COMM. L. REV. 19, 31 (2012) (“After losing its state in 1525, the Teutonic Order lost its attribute of an independent subject of international law.”); J. H. W. VERZIJL, 2 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 32–37 (M. Bos ed., 6th ed. 1968) (discussing the possible international legal personality of the Jesuits).

220. See Arthur C. Breycha-Vautier, *Order of St. John in International Law: A Forerunner of the Red Cross*, 48 AM. J. INT'L L. 554, 561 (1954) (reporting on the conclusions of a papal tribunal that “[t]he status of [the] sovereign Order . . . [i]s functional, that is to say, intended to assure the fulfilment of the scope of activities of the Order and its development throughout the world”); Cass., *Sovereign Order of Malta v. Brunelli, Tacali & Others*, 17 dicembre 1931 (It.), reprinted in 6 INT'L L. REP. 46 (stating that the SMOM has sovereign immunity “corresponding to the needs of its autonomy”).

221. See Michael Emerson, *Andorra and the European Union* 38–39 (Cent. for Eur. Policy Studies, 2007), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1333147; see also Treaty of Good Neighbourliness, Friendship and Co-operation, June 3, 1993, 1872 U.N.T.S. 181 (recognizing Andorra as a sovereign state); *Drozd & Janousek v. France & Spain*, 240 Eur. Ct. H.R. (ser A) ¶ 88 (1992) (recognizing Andorra as a “European country” rather than a “state” up until 1993).

222. There are arguments that the French President used his Princely office for the benefit of France, a state foreign to Andorra.

223. See, e.g., Agreement Between Great Britain, China and Tibet Amending the Trade Regulations of 5 December 1893, Apr. 20, 1908, 206 Consol. T.S. 412;

government in exile or an NLM movement. It often remains blurred whether the engagement with the person or office is truly on the political international plane or on a personal, professional, or spiritual level.²²⁴ Certainly, the Dalai Lama has a significant international influence on political outcomes, and considering our definition of personality as having the capacity for international agreement, legation, and claim, this actor does exhibit characteristics of functional personality.²²⁵

Convention Between Great Britain and Tibet, Sept. 7, 1904, 196 Consol. T.S. 312; Exchange of Notes Regarding the India-Tibet Frontier, Mar. 25, 1914, 219 Consol. T.S. 339; Trade Regulations Between Great Britain and Tibet, July 3, 1914, 220 Consol. T.S. 148. There are no agreements registered, however, with the U.N. Secretary-General that list Tibet or the Dalai Lama as a party.

224. See, e.g., U.S. Dep't of State, *Possible Dalai Lama Visit to Italy and Vatican*, Cable No. 1973ROME5798_b, WIKILEAKS paras. 1–3 (June 22, 1973), http://wikileaks.org/plusd/cables/1973ROME05798_b.html (reporting on the Dalai Lama's contacts with the Italian government and noting that if the People's Republic of China (PRC) demanded an explanation, the government of Italy would explain that the visit was “religious and cultural”); U.S. Dep't of State, *PRC Reaction to Dalai Lama*, Cable No. 1973COPENHAGEN2125_b, WIKILEAKS (Sept. 5, 1973), http://wikileaks.org/plusd/cables/1973COPENH02125_b.html (reporting on PRC pressure on the Danish Embassy to refuse a visa to the Dalai Lama and the Danish reply that the visit was purely as a “religious leader” and not as a “political figure”); U.S. Dep't of State, *Dalai Lama Visit to Austria*, Cable No. 1973VIENNA7734_b, WIKILEAKS para 2. (Sept. 19, 1973), http://wikileaks.org/plusd/cables/1973VIENNA07734_b.html (noting that Austria agreed to issue a visa on condition of a “commitment from Dalai Lama to refrain from all political activity.”); U.S. Dep't of State, *Foreign Minister Comments on Possible Dalai Lama Visit*, Cable No. 06ULAANBAATAR634_a, WIKILEAKS para. 3 (Aug. 18, 2006), http://wikileaks.org/plusd/cables/06ULAANBAATAR634_a.html (“[T]he U.S. likely would reiterate publicly our [U.S.] belief that the Dalai Lama is an international man of peace who should be allowed freedom to travel.”).

225. See, e.g., G.A. Res. 1353(XIV) (Oct. 21, 1959) (“Gravely concerned at reports, including the *official statements* of His Holiness the Dalai Lama, to the effect that the fundamental human rights and freedoms of the people of Tibet have been forcibly denied them. . . .” (emphasis added)); U.S. Dep't of State, *Dalai Lama Visit to Italy*, Cable No. 1973ROME9464_b, WIKILEAKS (Sept. 11, 1973), http://wikileaks.org/plusd/cables/1973ROME09464_b.html (reporting on the Dalai Lama's representative contacts with the Italian Foreign Ministry and other multiple European governments); U.S. Dep't of State, *The Dalai Lama's Representative in New Delhi*, Cable No. 1975NEWDE13760_b, WIKILEAKS (Oct. 15, 1975), http://wikileaks.org/plusd/cables/1975NEWDE13760_b.html (discussing a proposed meeting between Embassy Political Section officials and the Dalai Lama's representative); U.S. Dep't of State, *July 3 MFA Press Briefing: Yang DPRK Visit, Papal Letter, Tibetan Envoy, Climate Change, Food Safety, Visits, More*, Cable No.

The Ismaili Imamat²²⁶ is another religious actor with unclear personality. More obscure than the Dalai Lama or Pope, and

07BEIJING4457_a, WIKILEAKS (July 3, 2007), http://wikileaks.org/plusd/cables/07BEIJING4457_a.html (reporting on travels of the Dalai Lama's "Special Envoy"); U.S. Dep't of State, *Dalai Lama's Representative Predicts Continued Unrest in Tibet*, Cable No. 08NEWDELHI808_a, WIKILEAKS para. 1 (Mar. 18, 2008), http://wikileaks.org/plusd/cables/08NEWDELHI808_a.html (reporting on a meeting between a U.S. Ambassador and the Dalai Lama); U.S. Dep't of State, *Tibet: Scholars Praise Decision to Restart Contact with Dalai Lama, but Expectations are Low*, Cable No. 08BEIJING1697_a, WIKILEAKS (Apr. 30, 2008), https://wikileaks.org/plusd/cables/08BEIJING1697_a.html (discussing the PRC decision to reopen talks with the Dalai Lama's representatives); U.S. Dep't of State, *Tibet: MFA Says Talks with Dalai Lama Representatives "Mark a New Beginning,"* Cable No. 08BEIJING1715_a, WIKILEAKS para. 3 (May 5, 2008), http://wikileaks.org/plusd/cables/08BEIJING1715_a.html (discussing the meeting of PRC leadership representatives with private representatives of the Dalai Lama); U.S. Dep't of State, *July 8 MFA Press Briefing: Six-Party Talks, Dalai Lama Talks, Human Rights, Olympics, Xinjiang Mosque, Aid to DPRK, Sudan*, Cable No. 08BEIJING2666_a, WIKILEAKS para. 3 (July 8, 2008), http://wikileaks.org/plusd/cables/08BEIJING2666_a.html (reporting on "contact" between "competent parties" in the Chinese Government and the representatives of the Dalai Lama); U.S. Dep't of State, *Dalai Lama Seeks U.S. Engagement with China on Climate Change in Tibet, Says Political Agenda Can Wait*, Cable No. 09NEWDELHI1667_a, WIKILEAKS para. 7 (Aug. 10, 2009), https://wikileaks.org/plusd/cables/09NEWDELHI1667_a.html (reporting on a meeting between a U.S. Ambassador and the Dalai Lama); U.S. Dep't of State, *Tibet Party Official Derides Dalai Lama, Yet Welcomes Him "Home,"* Cable No. 09CHENGDU248_a, WIKILEAKS paras. 4, 10 (Nov. 6, 2009), http://wikileaks.org/plusd/cables/09CHENGDU248_a.html (discussing that "[f]rom 2002-2008, there were nine rounds of talks held with the personal representatives of the Dalai Lama" and reporting the Dalai Lama's speech to the European Parliament, where he advocated for the creation of a self-governing democratic Tibet "in association with the People's Republic of China").

226. See, e.g., Treaty Between the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat for the Establishment of the University of Central Asia, Aug. 28-31, 2000, 2159 U.N.T.S. 161 [hereinafter Treaty for the Establishment of the UCA]. The text and language of the agreement is clearly intended to be a treaty, although it is not entirely clear whether the Imamat was truly considered a treaty partner or if the agreement was a treaty only because there was more than one state in agreement. See also U.S. Dep't of State, *Tajikistan: Aga Khan Serena Hotel Probably Down the Tubes - "Who Wants On 'Old-Shoe Hotel?'"*, Cable No. 06DUSHANBE402_a, WIKILEAKS para. 10 (Mar. 1, 2006), https://wikileaks.org/plusd/cables/06DUSHANBE402_a.html [hereinafter Cable No. 06DUSHANBE402_a] (noting that the Aga Khan is "revered . . . as a sovereign" in the Gorno Badakhshan Autonomous Oblast in Tajikistan, is accorded "almost quasi-governmental status [in Tajikistan] because it essentially provides the lion's share of all

therefore requiring more explanation, the Ismaili Imam is the religious leadership of the global Ismaili community, which is led by the Aga Khan and has its own internal governance.²²⁷ While the Aga Khan's position has been compared to the Roman Catholic Pope²²⁸ due to his unusual mixture of religious and temporal authority,²²⁹ his precise position within the Ismaili religious community defies parallels to Western notions of religious leaders.²³⁰ The lineage of the hereditary imams is claimed to

development and even basic social support to the Pamiri people of Badakhshan," and that "[t]he current conventional political wisdom is that no one dares challenge the political power of the 'Khan of Tajikistan,' [the Aga Khan]"). *But see* His Highness Prince Karim Aga Khan v. Nagib Tajdin et al., [2011] F.C. 14, ¶¶ 25, 58–59 (Can. F.C.) (observing similarly that the Aga Khan submitted himself to a discovery interview apparently without any considerations of immunity); *Cable No. 08MADRID52_a*, *supra* note 185, paras. 1, 4 (reporting on the "First Forum of the Alliance of Civilizations," which was attended by the U.N. Secretary-General and many heads of state, including a representative of the Aga Khan, and alternatively describing the Aga Khan as a "private foundation" akin to the Carnegie Foundation); *supra* Part I.D (discussing the Carnegie Foundation).

227. *See Nagib Tajdin et al.*, [2011] F.C. ¶¶ 53–54 (making reference to the 1986 and 1998 "Constitutions" of the Imam); U.S. Dep't of State, *The Agha Khan Tries to Solve Electoral Impasse*, *Cable No. 09KABUL3383_a*, WIKILEAKS para. 2 (Oct. 21, 2009), http://wikileaks.org/plusd/cables/09KABUL3383_a.html [hereinafter *Cable No. 09KABUL3383_a*] ("The Agha Khan became Imam of the Shia Imami Ismaili Muslims in 1957. He is the 49th hereditary Imam of the Shia Imami Ismaili Muslims and a direct descendant of the Prophet Muhammad though his cousin and son-in-law Ali, the first Imam, and his wife Fatima, the Prophet Muhammad's daughter. The Ismailis live in 25 countries, mainly in West and Central Asia, Africa and the Middle East, and North American and Western Europe."); U.S. Dep't of State, *Rumored Exodus of Aga Khan Followers from Mozambique*, *Cable No. 1974-LOUREN-00275_b*, WIKILEAKS para. 1 (Apr. 25, 1974), https://www.wikileaks.org/plusd/cables/1974LOUREN00275_b.html ("We have heard a rumor circulating around Lourenco Marques' Indian community that Aga Khan followers (Ismaili) have been instructed by Aga Khan to leave Mozambique and establish themselves in another country with more promising economic climate – e.g. either metropolitan Portugal or Canada.").

228. *See* Thomas Thompson, *Three Faces of the Fourth Aga*, 63 LIFE, no. 2, 1967, at 43 (comparing the Aga Khan to the Catholic Pope).

229. *See* Haji Bibi v. H. H. Sir Sultan Mahomad Shah Aga Khan, 2 Ind. Cas. 874, para. 130 (1908) (India) (finding that the religious, monetary offerings made to the Aga Khan by his followers are his personal property); *Nagib Tajdin et al.*, [2011] F.C. ¶¶ 62–63 (observing that the defendant refused to conduct the discovery interview of the Aga Khan).

230. *See, e.g., Nagib Tajdin et al.*, [2011] F.C. ¶ 44 (observing that the defendants had great difficulty explaining the relationship of the Aga Khan and

begin with the Prophet Mohammed,²³¹ with the four most recent imams (including the current one) holding the title "Aga Khan."²³² The Aga Khan is a British citizen but is also granted the privilege of using a French diplomatic passport.²³³ Even today, he is sometimes considered a "royal" or even "sovereign" person without territorial sovereignty.²³⁴

Analyzing the international rights of treaty, legation, and claim, the general international legal personality of the Imam remains unclear, though there may be some rudimentary, functional rights. The Imam, however, is party to at least one treaty registered with the U.N. Secretary-General.²³⁵ In 2000, the states of Tajikistan, Kyrgyzstan, and Kazakhstan agreed with the Ismaili Imam to create the University of Central Asia (UCA).²³⁶ Of course, the founding of a university by treaty is not entirely unusual,²³⁷ even a treaty that includes a noninternational legal person as a party.²³⁸ This is reminiscent of BIS and

his followers outside of the Ismaili frame of reference); *Haji Bibi*, 2 Ind. Cas. para. 130.

231. See *Nagib Tajdin et al.*, [2011] F.C.; *Nagib Tajdin et al. v. His Highness Prince Karim Aga Khan*, 2012 F.C.A 12, ¶¶ 2–4 (Can.); *Haji Bibi*, 2 Ind. Cas. paras. 41–42; *Cable No. 09KABUL3383_a*, *supra* note 227, para. 2; AGHA KHAN DEV. NETWORK, *His Highness the Aga Khan*, http://www.akdn.org/about_agakhan.asp (last visited Sept. 28, 2016).

232. See *Cable No. 09KABUL3383_a*, *supra* note 227; see also G. Pascal Zachary, *The Aga Khan, a Jet-Setter Who Mixes Business and Islam*, N.Y. TIMES (July 9, 2007), <http://www.nytimes.com/2007/07/09/business/worldbusiness/09iht-khan.4.6569846.html>.

233. See *Nagib Tajdin et al.*, [2011] F.C.; *Nagib Tajdin*, 2012 F.C.A ¶¶ 3, 23.

234. See *Cable No. 08MADRID52_a*, *supra* note 185, paras. 1, 4; *Cable No. 06DUSHANBE402_a*, *supra* note 226, para. 10. Curiously, *Forbes* magazine lists him as the only nonterritorial sovereign in its annual list of the ten richest royals. See Tatiana Serafin, *The World's Richest Royals*, FORBES (July 7, 2010), <https://www.forbes.com/2010/07/07/richest-royals-wealth-monarch-wedding-divorce-billionaire.html>. Though imprecise, the Ismaili community within India and Africa enjoyed a certain degree of judicial independence. See Mumtaz Ali Tajddin, *Ismaili Constitution*, ENCYCLOPEDIA ISMAILISM, <http://ismaili.net/heritage/node/10433> (last visited Feb. 27, 2017).

235. See Treaty for the Establishment of the UCA, *supra* note 226. Note that the Aga Khan represented the Imam as an Imam.

236. See *id.*

237. See, e.g., Convention Setting up a European University Institute, Apr. 19, 1972 (amended 1992), <http://www.eui.eu/Documents/AboutEUI/Convention/ConsolidatedConventionRevising.pdf>.

238. For example, the Riga Graduate School of Law was created in 1998 as a limited liability nonprofit corporation under Latvian law by an international agreement between Sweden, Latvia, and the Soros Foundation, which also

GAVI. In addition, the establishment of a university with personality—apparently on the international plane—has precedent in the cases of the University for Peace and the European University Institute, both of which were created by treaty and enjoy certain immunities on the international plane.²³⁹ Furthermore, it is possible for international legal persons to enter into an agreement registered with the U.N. Secretary-General, yet not be considered a treaty.²⁴⁰ Nonetheless, in the case of the UCA, the instrument was expressly considered a treaty and registered as such,²⁴¹ although designation of an instrument as a “treaty” is only informative of its nature and is not by itself determinative.²⁴² The treaty did, however, include language that characterizes it as a treaty.²⁴³ It identified all parties as the “Founders” and clearly identified the states parties as “Founding States.”²⁴⁴

gifted the school its building. Over time, the shares in the school were transferred from the states to the University of Latvia, though the Soros Foundation retained its ownership interest. See Riga Graduate Sch. of Law, *History*, RGSL.EDU, <http://www.rgsl.edu.lv/en/inside-rgsl/about/history/> (last visited Feb. 27, 2017).

239. See Agreement Concerning the Headquarters of the University for Peace, *supra* note 132, arts. 5 (“The Headquarters seat shall be inviolable and shall be under the control and authority of the University.”), 6 (“The University premises, its assets, income and other property shall enjoy the same terms and protection as United Nations premises, assets and income in Costa Rica.”); Convention Setting up a European University Institute, *supra* note 237; Treaty for the Establishment of the UCA, *supra* note 226, art. 2.

240. See, e.g., Joint Financing Agreement, June 7, 1971, 891 U.N.T.S. 123.

241. See Treaty for the Establishment of the UCA, *supra* note 226, arts. 7 (“Except as specifically authorised in Article 16 of the Charter, this Treaty and the Charter shall not be amended without the unanimous written agreement of each of the Founders. . .”), 9 (“This Treaty is executed in five original copies by the Founders in the Tajik, Kyrgyz, Kazakh, Russian and English languages. . .”), 11 (“This Treaty can be renounced by any Founding State in accordance with its national legislation and with the approval of the Parliament. . .”), 13 (“This Treaty may be executed in five counterparts, each of which shall be deemed an original. . .”), 2.13 (“‘Treaty’ means the Treaty of the Founders of the University of Central Asia signed as of August 31, 2000 which is an international Treaty entered into among the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imam.”).

242. VCLT, *supra* note 19, art. 2.

243. See Treaty for the Establishment of the UCA, *supra* note 226, arts. 7, 8 (“All differences arising out of the implementation of this Treaty shall be resolved amicably. . .”), 9, 11, 12 (“The Charter shall be an integral part of this Treaty. . .”), 13.

244. See *id.* pmbl. The preamble states:

The text does not explicitly state whether the treaty qualifies as such under the VCLT; and it may be that the states considered the Imam as a noncontracting, third-party (albeit a "Founder"). An alternative understanding could be that all the parties are equal actors and that the agreement is truly multilateral. After all, the Aga Khan's signing of the instrument is atypical of a mere third-party beneficiary. The treaty can also be contemplated as bilateral between the states on the one hand and the Imam on the other. If the Imam was a third-party beneficiary, then it would not necessarily need to be considered an international legal person, though that possibility is not excluded. If the treaty was either multilateral or bilateral, however, the Imam would need to be considered an international legal person with at least functional treaty-making powers. The Charter of the UCA, which is annexed to the treaty, simply says that the agreement is an "international Treaty entered into among the Republic of Tajikistan, the Kyrgyz Republic, the Republic of Kazakhstan and the Ismaili Imamat."²⁴⁵ The use of the word "among" suggests a truly multilateral treaty among persons with treaty-making powers. This may lead to the outcome where at least several states in the world may consider the Imam an international legal person, at least insofar as the UCA treaty is concerned.

Turning to the other international capacities, we find that, generally, the Imam is not considered an international legal person. For example, the current Aga Khan and his predecessor were parties to civil lawsuits, however, they have not, thus far,

This Treaty (the "Treaty") is entered among: The Republic of Tajikistan . . . The Kyrgyz Republic . . . ; and the Republic of Kazakhstan Each of the foregoing Republics are hereinafter collectively referred to as "the Founding States"; And The Ismaili Imamat represented by his highness the Aga Khan the 49th Hereditary Imam of the Shia Imami Ismaili Muslims (the "Ismaili Imamat"); The Founding States and the Ismaili Imamat are hereinafter collectively referred to as the "Founders."

Id.

245. Treaty for the Establishment of the UCA, *supra* note 226, annex, Charter of the University of Central Asia.

claimed sovereign immunity.²⁴⁶ In addition, the Imamat does not appear to engage in active and passive legation. The Aga Khan is intimately involved in international politics²⁴⁷ and is accorded considerable respect and attention in diplomatic circles,²⁴⁸ but

246. His Highness Prince Karim Aga Khan v. Nagib Tajdin et al., [2011] F.C. 14, ¶¶ 25, 58–59 (Can. F.C.) (observing that the Aga Kahn submitted himself to a discovery interview and t that the Aga Khan authorized the lawsuit as a plaintiff); Haji Bibi v. H. H. Sir Sultan Mahomad Shah Aga Khan, 2 Ind. Cas. 874 (1908) (India) (noting the ability of the Aga Khan to sue in his personal capacity).

247. In February 2014, he was invited to address the Canadian House of Commons. See Canada, Parliament, *Parliamentary Debates*, 41st Parl., 2d Sess., Vol. 147, No. 44 (Feb. 7, 2014), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6415231#Int-8223054>.

248. See *Cable No. 09KABUL3383_a*, *supra* note 227, paras. 1, 3, 6, 8, 9. The U.S Department of State held multiple meetings and diplomatic-level conversations on the future of Afghanistan with respect to the Aga Khan. The discussions included the following:

1. (C) Summary and Comment. The very well-informed Aga Khan told assembled ambassadors 14 October that he had met separately with President Karzai and leading opposition candidate Abdullah Abdullah, and had told them that the political process in Afghanistan has failed. ... With his access and the high level of assistance the Aga Khan Development Network (AKDN) affords to Afghanistan, the Aga Khan is a serious voice that Afghans, including Hamid Karzai, respect and listen to. . . .

3. (C) On 14 October the Aga Khan met with Ambassadors of the United States (Eikenberry and Carney), France, UK, India, Pakistan, Germany, EU, and the Commander of International Security Assistance Forces (ISAF). The Aga Khan's representative, Ali Mawji, organized the event. After presentations by the assembled guests that generally emphasized Afghanistan's perilous security and political conditions, the Aga Khan embarked on an informative tour d' horizon, including details of his suggestions following earlier meetings with President Karzai and Dr. Abdullah. . . .

6. (C) The Aga Khan's third point centered on the political situation. The Aga Khan explained that he had solicited Karzai's and Abdullah's views on the future of the country in the face of a failed political process. He recounted that he had advised both candidates that, regardless of the election outcome, they should work together. . . .

his precise legal authority fluctuates between quasi-governmental authority²⁴⁹ and unofficial capacity.²⁵⁰ The one representative office of the Imam, located in Canada, carefully refers to itself as a cultural “delegation” and not a political office.²⁵¹ Part

8. (C) In his presentation, the Aga Khan mentioned his awareness that the Afghan Constitution does not allow for a prime minister; whatever position Abdullah would occupy must be constitutional and must factor in parliamentary sensitivities. . . . He took on board without comment the French Ambassador’s suggestion that a “Senior Minister” be named who could perform the role of a PM, without the title, but that ensuring parliamentary acceptance would be vital.

9. (C) In response to questions and observations, the Aga Khan noted that he does not favor changing the Constitution.

Id.

249. See *Cable No. 06DUSHANBE402_a*, *supra* note 226, para. 10; *Five Things to Know About the Aga Khan*, RADIO FREE EUR. RADIO LIBERTY (Feb. 23, 2014), <http://www.rferl.org/content/aga-khan-explainer/24686969.html> (discussing that the Aga Khan is treated with “a certain degree of suspicion” or “caution in some political circles in Tajikistan” because Gorno-Badakhshan autonomous province is the only predominantly Ismaili region in the world, is occasionally agitating for independence from Tajikistan, and “the local populations there have more faith in and respect for the Imam Aga Khan than for President Emomali Rahmon”).

250. See *Cable No. 06DUSHANBE402_a*, *supra* note 226, para. 10 (reporting that the Aga Khan was building a luxurious Ismaili Center in Tajikistan); U.S. Dep’t of State, *Afghanistan: All Systems (Still) Go for Former King’s Return*, *Cable No. 02ROME1797_a*, WIKILEAKS (Apr. 10, 2002), https://wikileaks.org/plusd/cables/02ROME1797_a.html (reporting that the Aga Khan loaned the airplane used by the former Afghan king’s son-in-law, who was arranging for the former king’s return to Afghanistan); U.S. Dep’t of State, *Private Trade Opportunity: Construction of Teaching Hospital*, *Cable No. 1974KARACH01414_b*, WIKILEAKS para. 10 (July 5, 1974), https://www.wikileaks.org/plusd/cables/1974KARACH01414_b.html (describing the “[p]roject being built and financed by Aga Khan Hospital and Medical College, a charitable foundation in Pakistan supported by the wealthy international Muslim sect called Ismaili led by His Highness, the Aga Khan”).

251. See *Inauguration of the Delegation of the Ismaili Imam in Ottawa, Canada*, AGA KHAN DEV. NETWORK (Dec. 6, 2008), <http://www.akdn.org/event/inauguration-delegation-ismaili-imamat-ottawa-canada> (noting that the Delegation will serve a representational role for the Imam and the Aga Khan Development Network’s nine nondenominational, philanthropic, and development agencies); Jeff Davis, *The Stately Launch of the Ismaili Delegation*, HILL TIMES (Sept. 16, 2012), <http://www.hilltimes.com/global/2012/09/16/the-stately-launch-of-the-ismaili-delegation/27036>.

of the explanation for the international community's treatment of the Aga Khan may be due to his religious and traditional capacity but may also derive from his wealth and management of the prominent NGO, the Aga Khan Development Network. This suggests that the Imamatus commands a certain degree of reverence on the international plane but does not operate fully as an international legal person, especially in comparison to the Holy See. Thus, the functional analysis concludes that the Ismaili Imamatus is not an international legal person in the broadest sense, although it may be treated as such from time to time on a functional level.

F. The Individual

The last category for comparative purposes is the individual. Historically, certain persons, usually members of royal houses,²⁵² but not exclusively so,²⁵³ were seen to have interna-

252. See, e.g., Treaty Between the Princess Dowager of Orange and the Elector of Brandenburg, Aug. 13, 1651, 2 Consol. T.S. 375; Treaty Between the Elector of Brandenburg and the Duke of Neuburg, Oct. 11, 1651, 2 Consol. T.S. 383; Hereditary Agreement Between Members of the Ducal House of Saxony, Apr. 22, 1657, 4 Consol. T.S. 275; Agreement Between the Dukes of Saxony, Sept. 23, 1659, 5 Consol. T.S. 303; Agreement Between the Elector of Brandenburg and the Princes of Anhalt, Jan. 7, 1681, 16 Consol. T.S. 47; Agreement Between the Emperor and the Elector of Brandenburg, Oct. 10, 1687, 18 Consol. T.S. 167; Monetary Agreement Between the Electors and Princes of the Empire, Sept. 16, 1691, 19 Consol. T.S. 33. Although, now, royal family members are considered to be nationals of their states or former states. See, e.g., *Former King of Greece et al. v. Greece*, 2000-XII Eur. Ct. H.R. 119, 131-33, ¶ 41; *Austria Admin. Ct.*, Feb. 11, 1980, Case No. ZI 201 79, *Habsburg-Lorraine v. Austria* (Austria), reprinted in 77 INT'L L. REP. 475, 485 (applying the Universal Declaration of Human Rights to the Austrian passport application of the son of the last Austrian Emperor).

253. See, e.g., Concordat Between the Abbess and Foundation of Quedlinburg and the Elector of Saxony, Feb. 18, 1685, 17 Consol. T.S. 199; Agreement Between Brandenburg, Duke August of Saxony (as Administrator of Magdeburg) and the Council of the City of Magdeburg, May 29, 1666, 9 Consol. T.S. 179; Preliminary Agreement Pursuant to the Agreements of 1(11) February 1693 and 4(14) March 1694 for the Maintenance of the Harmony of the Empire etc. Between the Bishop of Worms (also Head of the Teutonic Order), the Bishops of Wurzburg, Constance and Munster, the Abbot of Fulda, the Duke of Saxe-Gotha and Margrave of Baden-Durlach, the Dukes of Wolfenbuttel, the Landgraves of Hesse-Cassel and Hesse-Darmstadt, the Margrave of Baden-Baden, the King of Denmark (as Duke of Holstein) and the House of Anhalt, Feb. 15, 1700, 22 Consol. T.S. 449; see also Paréage Creating Andorra, *op cit.*

tional personality to conclude international agreements on everything from military arrangements (which are inherently agreements under public law)²⁵⁴ to marriage and inheritance (which are not, at least to modern observers).²⁵⁵ In many of these cases, though, it is not entirely clear whether the person, as the contracting entity, was acting in a private or public capacity of the state. Such distinctions were not made before the widespread expansion of democratic sovereignty many centuries ago.²⁵⁶ Similarly, in an international agreement made by and in the name of the Pope,²⁵⁷ rather than the Holy See or Vatican City State, it is not completely clear whether it was the true intention of the parties to bind the individual or the church as the international legal person. The treaties between Napoleon and the King of France, in which Napoleon ceded authority back to the

254. See, e.g., Treaty of Defensive Alliance Between the German Princes, Aug. 22, 1667, 10 Consol. T.S. 319; Defensive Armed Union Between the Princes of the Empire (Wurzburg, Munster, Worms, Eichstadt, Saxe-Coburg, Baden-Durlach, Brandenburg-Culmbach, Brandenburg-Onolzbach, Hesse-Darmstadt, Denmark (Holstein), Brunswick-Wolfenbuttel, Baden-Baden and Saxe-Eisenach), July 15, 1700, 23 Consol. T.S. 35; Agreement Between the Princes of the Empire in Opposition to the Ninth Electorate, July 1701, 23 Consol. T.S. 447.

255. See, e.g., Inheritance Agreement Between the Elector and the Margrave of Brandenburg, Mar. 3, 1692, 19 Consol. T.S. 397; Matrimonial Treaty Between Maximilian Emmanuel, Elector of Bavaria, and John III, King of Poland, in the Name of His Daughter, the Princess Theresa Cunegunda, Bavaria-Poland, May 19, 1694, 20 Consol. T.S. 369; Treaty for the Marriage of King John V and the Archduchess Maria Anna, Between the Emperor and Portugal, June 24, 1708, 26 Consol. T.S. 185 [hereinafter Treaty for the Marriage of King John V and the Archduchess Maria Anna].

256. See, e.g., Agreement Between the Palatinate, the Dukes of Brunswick-Wolfenbüttel, Brunswick-Zell and Wurtemberg, and the Landgraves of Hesse-Cassel and Hesse-Darmstadt, Apr. 17, 1662, 7 Consol. T.S. 131; Postal Treaty Between Prussia and Thurn and Taxis, May 22, 1722, 31 Consol. T.S. 375; Agreement Between Hamburg and the House of Holstein, May 27, 1768, 44 Consol. T.S. 187; Treaty for the Marriage of King John V and the Archduchess Maria Anna, *supra* note 255; Treaty of Confederation of the States of the Rhine (France, Bavaria, Wurtemberg, Mayence, Baden etc.), July 12, 1806, 58 Consol. T.S. 459; Accord Between the Archduke Leopold of Austria (as Grand Master of the Teutonic Order) and the Netherlands, June 14, 1662, 7 Consol. T.S. 181; see also JACQUES-ANTOINE DULAURE, 6 HISTOIRE DE PARIS 298 (1834) (citing the French King's Address to the Parliament of Paris of April 13, 1655, in which he uttered the famous, and likely apocryphal quote, "*L'état c'est moi*").

257. See Agreement Between Hanover and the Pope, Mar. 26, 1824, 74 Consol. T. S. 111.

historic French dynasty, appear to be personal treaties,²⁵⁸ and in light of precedent are not so surprising, though perhaps they were already anachronistic by the time of their conclusion. From a historical perspective, therefore, it is not surprising that international legal personality for sovereign (and comparable) individuals was phased out of practice in contemporary international law.²⁵⁹ Now, however, questions are being raised regarding whether every individual has some capacity for international personality.

Some scholars now argue that international law is evolving to embrace the individual.²⁶⁰ Even in interstate disputes, the con-

258. See Treaty of Fontainebleau, Apr. 11, 1814, *translated in* 1 ALPHONSE MARIE LOUIS DE LAMARTINE, *THE HISTORY OF THE RESTORATION OF MONARCHY IN FRANCE* 201–06 (1854) (“His Majesty the Emperor Napoleon on the one part, and their Majesties the Emperor of Austria, King of Hungary and Bohemia, the Emperor of all the Russians, and the King of Prussia, stipulating in their own names, as well as in that of all the allies, on the other. . .”).

259. Thus, contemporary treaties in the name of the monarch are always regarded as being in effect in the name of the state. See, e.g., ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 19 (3d ed. 2013).

260. See THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 1 (2006) (describing the impact of human rights and humanitarian law on many other parts of international law and asserting that “[t]he humanization of public international law under the impact of human rights has shifted its focus above all from State-centered to individual-centered”). International human rights law bestows individuals with a panoply of rights. See American Convention on Human Rights arts. 4, 5, 6, Nov. 22, 1969, 1144 U.N.T.S. 123; ICCPR, *supra* note 47, arts. 18, 21; ICESCR, *supra* note 47, arts. 6, 11, 15. Also, individuals have standing to pursue claims against states for violating human rights treaties. See, e.g., Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79) (1979); ECHR, *supra* note 189, arts. 1–18; Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and People’s Rights art. 5, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT.1.rev2 (1997) (entered into force Jan. 25, 2004).

cern for and protection of the individual is increasingly important.²⁶¹ Certainly, individuals can violate international criminal law.²⁶² In addition, the U.N. Security Council has issued resolutions directly imposing obligations on individuals under international law.²⁶³ Furthermore, individuals have been granted rights directly under international law, for example, in human rights treaties and bilateral investment treaties.²⁶⁴ Surely, international law contemplates that individuals can bear duties and rights directly under international law, but what remains unclear is whether all individuals have the kind of capacity that ancient sovereigns have had to enjoy a wider scope of international legal personality. In *Prosecutor v. Karadžić*, the defendant argued that he had reached an agreement with Richard

261. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Request for the Indication of Provision Measures, Order, 2009 I.C.J. Rep. 139, ¶ 21 (May 28) (dissenting opinion by Cançado Trindade, J.). Justice Trindade noted:

Nostalgics of the past, entrapped in their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also of individuals, their nationals, or even in a larger framework, their inhabitants.

Id.

262. See *United States v. Goering et al.*, in XXII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS [T.W.C.] 466 (1947).

263. See, e.g., S.C. Res. 2178, ¶ 1 (Sept. 24, 2014) (“[A]ll foreign terrorist fighters [must] disarm and cease all terrorist acts and participation in the conflict.”); see also S.C. Res. 814 (Mar. 26, 1993); S.C. Res. 1010 (Aug. 10, 1995); S.C. Res. 1160 (Mar. 31, 1998); S.C. Res. 1199 (Sept. 23, 1998); S.C. Res. 1203 (Oct. 24, 1998); S.C. Res. 1306 (July 5, 2000); S.C. Res. 1333 (Dec. 19, 2000) (creating a committee for imposing sanctions on individuals); S.C. Res. 1474 (Apr. 8, 2003) (addressing potential obligations of “States and other actors”); S.C. Res. 2000 (July 27, 2011). But see S.C. Res. 1267 (Oct. 15, 1999) (limiting the obligations to control individuals’ acts to states only); S.C. Res. 1343 (Mar. 7, 2001); S.C. Res. 1540 (Apr. 28, 2004); S.C. Res. 1624 (Sept. 14, 2005); S.C. Res. 1838 (Oct. 7, 2008); S.C. Res. 2136 (Jan. 30, 2014).

264. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 302; *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 6 ICSID Rev. 526 (1991) (rendering an award in the first investor arbitration claim case of its kind brought under a bilateral investment treaty).

Holbrooke, the U.N. envoy on the Bosnian peace process, which provided Karadžić with immunity and protection against prosecution. While Karadžić failed to prove the existence of the agreement, Karadžić seems to suggest that, had it been produced, the agreement would have been valid under international law.²⁶⁵ This claim, while dubious, reflects ancient practice. Some scholars argue that individuals, or at least collective groups of individuals in the sense of civil society, should contribute to the formation of customary international law instead of or alongside the state.²⁶⁶ Some even assert that the individual is the only original, natural person in international law,²⁶⁷ which harkens back to the skepticism over the distinction between original and derived personality. Once again, practice evolves to address the “requirements of international life,” with individuals occasionally enjoying a functional, relative degree of personality.²⁶⁸ Our conclusion must be that the existence and degree of international legal personality in individuals is fluctuating and relative depending on the state of international law and the needs of the international community, which potentially keeps the door open for future expansion of personality.

CONCLUSION

Some scholars argue that personality, as a notion, should effectively be abandoned in favor of a new way to think about actors in international law.²⁶⁹ This perspective is attractive and

265. See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on the Accused's Holbrooke Agreement Motion (Int'l Crim. Trib. for the Former Yugoslavia July 8, 2009); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 12, 2009).

266. See *Legal Consequences for Continued Presence of South Africa in Namibia*, 1971 I.C.J. at 69–70, 74 (separate opinion by Ammoun, J.); *Western Sahara*, 1975 I.C.J. at 100 (separate opinion by Ammoun, J.).

267. See NIJMAN, *supra* note 1, at 243, 457–73; cf. Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

268. See *Reparation for Injuries Suffered in Service of the United Nations*, 1949 I.C.J. at 179; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. at 78–79, 198 (dissenting opinion by Koroma) (“I agree with the Court that because of the necessities of international life, it is accepted that international organizations can exercise implied powers, which are not in conflict with their constitution and are required to ensure their effectiveness.”).

269. See, e.g., ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49–51 (1999).

can certainly be considered, but, for now, personality retains an important status. The difficulty is that the rights of personality are fragmenting, and the international community needs to develop a coherent understanding of how to identify and draw consequences from personality.

The preceding survey of the various ways that personality is understood in international law suggests that the common thread is one of functionality. International organizations are the most obvious entity based on functional existence, but we also find quasi-international organizations may be treated as if they were international organizations depending on their function. Additionally, the article observes that other collective entities, such as corporations and NGOs, as well as singular entities (individuals), similarly enjoy aspects of international legal personality based on how they function within the international legal order. Some of these entities, such as NLMs, indigenous peoples, or insurgents, have some kind of territorial existence, and their personality blurs into statehood. The most obvious of these is the collective triumvirate of the PLO, the Palestinian Authority, and the state of Palestine. In each of these cases, the distinction between being an international legal person and being treated as an international legal person dissolves, and we are left with relative rights and duties as the basis for or manifestation of personality.

The dominant paradigm of the functionalist premise for the law of international organizations assumes that organizations fulfill functions, in that they are cooperative endeavors between states.²⁷⁰ For the other entities in this article, however, there was a similar political choice to view the entity as fulfilling a similarly important function, and treat the entity as having personality for that purpose. On this basis, this article concludes that questionable entities may be regarded as relative international legal persons depending on the function at issue. For example, insurgents have personality as a basis for the application of international humanitarian law, NGOs have personality in order to insulate them from state politics, and certain religious organizations have personality for the promotion of the religious mission. In this way, the functionalist, analytical approach that

270. See Klabbers, *supra* note 2, at 645.

forms the core of the theory of the law of international organizations is also the preferred approach to assessing the personality of questionable entities in the international legal system.

Perhaps then it is time to retire the notion of the monolithic, singular status of the international legal person and instead recognize that personality is essentially a status of holding rights and duties, and that rights and duties fluctuate based on functions. We might still place states in a special category as the grantors of rights, but we need to acknowledge that other entities are increasingly enjoying relative personality based on their functions.